Federal Aquaculture Regulation

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ABSTRACT

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The regulation of aquaculture in Canada has evolved over the years as an adjunct to regulation of the wild fishery. As a result the regulations enacted by the federal government pertaining to aquaculture are found in a variety of documents, primarily the Fisheries Act and regulations passed under its authority. The author examines in detail these regulations and points out problems posed by their provisions and the lack of a consolidated set of federal aquaculture regulations. The federal government's constitutional mandate is examined as against existing aquaculture regulations. Particular attention is paid to ambiguities posed by dealing with aquaculture in conjunction with the wild fishery, such as whether size, number, year, and season restrictions unintentionally apply to culturists. The range of areas related to aquaculture in which federal control is asserted is catalogued and examined with respect to uniformity, redundancy and inconsistency. As well administrative practices are looked at in terms of whether they are supported by legislation. Finally, three possible ways of proceeding to solve the deficiencies uncovered are suggested. The author recommends proceeding toward reform of this area of law by preparing a discussion paper in legislative form.

RÉSUMÉ

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Au fil des années, la réglementation canadienne sur l'aquiculture a été élaborée comme une annexe de celle des pêches. Les règlements relatifs à l'aquiculture adoptés par le gouvernement fédéral se trouvent donc disséminés dans divers documents, surtout la Loi sur les pêcheries et les règlements adoptés en vertu de cette loi. L'auteur fait un examen détaillé de ces règlements et souligne les problèmes que posent leurs dispositions de même que l'absence d'une réglementation fédérale unifiée touchant l'aquiculture. La réglementation actuelle sur l'aquiculture est étudiée dans le cadre du mandat constitutionnel du gouvernement fédéral. L'auteur met l'accent sur les ambiguités qui découlent du traitement connexe de l'aquiculture et des pêches, notamment en ce qui concerne l'application involontaire aux aquiculteurs de limites de taille, de nombre, d'engin et de saison. La gamme des domaines connexes à l'aquiculture, dont la responsabilité est revendiquée par le gouvernement fédéral, est répertoirée et examinée du point de vue de l'uniformité, la redondance et le manque de cohérence. Les pratiques administratives font aussi l'objet d'un examen portant sur leur bien-fondé législatif. L'auteur propose, pour terminer, trois modes d'action qui permettraient de corriger les lacunes relevées. Il recommande aussi de s'attaquer à la réforme de ce domaine par la préparation d'un document d'étude à caractère législatif.

FEDERAL AQUACULTURE REGULATION

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1. INTRODUCTION

Aquaculture is an industry in Canada whose regulatory framework is complicated. It is complicated because aquaculture entails a variety of legally relevant activities (e.g. the use of waters, marine and non-tidal, and of land; fish health; species introduction; and transportation and marketing), because Canada is a federal state with divided legislative jurisdictions and frequent delegation of administrative responsibilities, and because legislative provisions governing aquaculture have been enacted by both levels of government piecemeal, over an extended period of time, often on a species- and geographic-specific basis, usually as part of fisheries regulation. The provincial role in aquaculture, including both the actual legislative provisions currently in use and a model for the future, has been canvassed in detail in an earlier work--Aquaculture: The Legal Framework.[1] The purpose of the present paper is to assemble and critique the present role of the federal government in regulating aspects of aquaculture. In carrying out this work, I have reviewed the host of statutes and regulations set out in Appendix I to this paper.

My initial objective was to examine the legislation for uniformity, redundancy, compatibility, constitutionality and unintentional application to culturists. While these somewhat narrow objectives represent valid concerns, a more serious issue with the federal regulatory framework has

emerged: to what extent should aquaculture be considered part of and be included in fisheries legislation? Since fisheries laws have so embraced aquaculture, the further question of the extent to which this is constitutionally justified must be asked. These concerns lead up to the ultimate one: from a law reform perspective, what might be done to better rationalize the federal regulatory role in aquaculture?

The latter question entails issues of policy: given a constitutionally broad power to deal with aspects of aquaculture, what roles ought the federal government undertake and to what extent? An example might be financial assistance. These questions I have partly addressed in other works,[2] and it is not part of my mandate to deal with them here. Rather the concern of this paper is how the federal government, acting within its constitutional authority, might go about setting up a more rational legal framework to do at least those things it is already doing.

I will begin by briefly considering the relevant constitutional mandates of the federal government and then move to discuss the way federal legislation seems to contemplate the relationship between aquaculture and fisheries. From here I will detail the specific areas where federal control is asserted, then note any constitutional difficulties that emerge. The final sections of the paper will focus on what reform of the legal framework for federal aquaculture regulation might look like and what might next be done to advance the process of reform.

2. THE FEDERAL CONSTITUTIONAL MANDATE

A. General Principles

I have canvassed in two other documents, from different viewpoints, constitutional considerations pertinent to aquaculture.[3] Rather than duplicate these discussions here, I will simply state the more relevant conclusions that emerge. They are:

1. The federal government's power to legislate in relation to sea coast and inland fisheries allows it to enact measures to protect and preserve both marine and freshwater fisheries as a public resource (Constitution Acts, 1867-1982, s. 91(12)).
2. The central aspect of private aquaculture, i.e. growing aquatic organisms under manipulated conditions while within the possession or under the control of private individuals, is most likely a matter of private property rights under provincial control (Constitution Acts, 1867-1982, s. 92(13)). The federal concern is not with the principal activity in and of itself, but rather with any undesirable incidental impacts on the public fishery resource. This is somewhat analogous to the distinction between the provincially controlled, private-property interest in the freshwater fishery and the federal regulatory control of this freshwater fishery to protect and preserve it.
3. The subaquatic lands underlying freshwater lakes and rivers and tidal areas within bays, inlets and estuaries (with minor exceptions in both cases) and perhaps some distance into the offshore, are part of the provincially controlled property base.

4. There are other federal heads of power which are relevant to aspects of aquaculture, the chief ones being

   A. Shipping and navigation (Constitution Act, 1867-1982, s. 91(10)), under which control may be asserted over the aquatic location of culturing facilities so as not to obstruct navigation.

   B. The regulation of trade and commerce (Constitution Act, 1867-1982, s. 91(2)), under which control may be asserted over the shipment of articles of commerce into and out of the country and between provinces. The clearest examples would be the import of seed stock and the export of aquacultural produce.

B. Delegation

As proposition 1 above stated, full regulatory control over tidal and non-tidal fisheries as a public resource in need of protection and preservation resides in the federal government. This power undoubtedly includes enhancement of the resource, at least to some such level as maximum or optimum sustained yield. And as propositions 2 and 3 above note, property aspects, both personal and real, of culturing activities are likely exclusively provincial. The reconciliation of these powers in practice has posed problems. Some of the uncertainty has been resolved in some cases by agreement, and in others by the clear delegation of administrative authority. These forms of delegation often go beyond mere clarification and actually expand the role of one level of government in constitutionally forbidden areas. Examples of such delegation include:

1. Oyster leases--On February 27, 1928 by agreement between the federal government and Prince Edward Island, the power to lease subaquatic

lands for shellfish culturing was transferred to the federal government. A similar agreement was made in Nova Scotia in 1936.[4] In British Columbia, an Oyster Lease Agreement was made on October 7, 1912 under which B.C., rather than the federal government, was to grant and administer oyster leases. Why was a different result arrived at on each coast? More importantly, who has the power in the first place? For example, if either side revoked the agreement, who would than have the power to grant subaquatic lands in tidal waters for oyster culturing?

2. In his excellent report on delegation of fisheries matters,[5] Parisien details a number of instances where the federal government has agreed to transfer control of the freshwater fisheries, or even, in the case of Québec, the coastal fisheries, to a province.[6] As well, fish hatcheries have been turned over to the provinces in a number of instances. These usually take the form of a property transfer, with security to employees, but are based on the understanding that the provinces are going to take over control of the fishery resource serviced by the hatcheries, namely, the freshwater sports fishery.

3. The practice invariably followed where control of aspects of the fishery are turned over to the province is to designate provincial officials, usually Ministers of provincial governments, to administer province-specific regulations, which are still federally enacted. Thus:

   A. The Alberta Fishery Regulations give all powers to the "chief fishery officer," who is defined in s. 2(1) as "the Assistant

Deputy Minister of the Fish and Wildlife Division of the Department of Energy and Natural Resources of the Province of Alberta."

B. The British Columbia Fishery (General) Regulations are divided into tidal and non-tidal parts and "Minister" for the non-tidal parts is defined in ss. 28 and 55 as "the Minister of Environment for British Columbia."

C. The Manitoba Fishery Regulations define the "Minister" in s. 2 as "the member of the Executive Council of Manitoba charged by the Lieutenant Governor in Council of Manitoba with the administration of these Regulations."

D. The Ontario Fishery Regulations define "Minister" in s. (1) as "the Minister of Natural Resources for Ontario and includes any person authorized by him to act on his behalf."

E. The Quebec Fishery Regulations define "Minister" in s. 2(1) as

"(a) in respect of commercial fishing in tidal waters other than commercial anadromous Atlantic salmon fi hing, the Minister of Agriculture, Fisheries and Food for Quebec, and

(b) in respect of any commercial and sport fishing of anadromous Atlantic salmon and of fishing other than commercial fishing in tidal waters, the Minister of Recreation, Fish and Game for Quebec."

F. The Saskatchewan Fishery Regulations define "Minister" in s. 2 as

> "(a) in relation to waters in that portion of the Province lying north of a line set out in an Order published in the Saskatchewan Gazette as Order in Council 1065/73, the Minister of Northern Saskatchewan, and
>
> (b) in relation to all other waters of the Province, the Minister of Tourism and Renewable Resources."

G. In relation to tidal waters in British Columbia and all waters in the provinces of New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island, the regulations do not define "Minister." This is because "Minister" is defined in the Fisheries Act itself and so means the federal Minister of Fisheries and Oceans. Federal administration is thus left unaltered.

In addition to the ten province-specific, federally enacted fishery regulations, other federal regulations sometimes assign administrative control to officials of provincial governments. An example would be the Fish Health Protection Regulations.

Three further points about delegation should be appreciated. First, all that can be constitutionally delegated are administrative powers, i.e. the ability to carry out the responsibility of administering regulations that have already been enacted. One level of government may not delegate its legislative powers to the other.[7] This is because ss. 91 and 92 of the Constitution Acts, 1867-1982 confer legislative power "exclusively." A second vital point to bear in mind is that a delegated authority is, by its very nature, revocable. He who grants authority may take it away. This is very clearly the case where, as in the provincial fishery regulations, the federally enacted regulations name a provincially appointed official to

administer them. It is also the case even where a more formal agreement exists, as in respect of oyster leasing. This is not to say that there may not be legal liability for damages, but only that authority may be validly withdrawn.

The third point is a corollary of the first, and one of the most important to recognize in relation to this report. It is this: if delegation cannot enlarge legislative power, each of the aquaculture provisions in the Fisheries Act (Canada) and regulations under it must be constitutionally justifiable by reference to a head of federal power. Just because a province might acquiesce by virtue of prior consultation and agreement in the provisions federally enacted in relation to it, does not mean that they are valid:

> The British North America Act divides legislative jurisdiction between the Parliament of Canada and the legislatures of the Provinces and there is no way in which these bodies may agree to a different division.[8]

In my view, the provinces have no authority to allow matters within their jurisdiction to be included in the federal regulations just because they will be provincially administered.

It should be noted that one of the original objectives in this project was to ascertain federal/provincial agreements that dealt with matters related to aquaculture. In this regard, the Parisien report has proved excellent for the period to the early 1970s, and there have been only a couple of developments since that time. One is the salmonid enhancement program with British Columbia and another is the transfer of trout hatcheries to the province in Nova Scotia. However, the most important

point for our purposes to bear in mind concerning all these agreements is that they deal only with administration (or, in limited cases, such as hatcheries, with property ownership) and not with legislative powers. To the extent these agreements have legislative implications, they have been incorporated into existing legislation, primarily by designating provincial officials to administer them. Thus, the existing regulations may be taken as an accurate reflection of old agreements. As well, and most importantly, the delegated administrative powers of the provinces are subject to adjustment as the delegator giving authority (i.e. the federal government) thinks fit. In short, these agreements no longer appear to me to have the significance originally contemplated and hence will not be emphasized further.

3. AQUACULTURE REGULATION AS FISHERIES LEGISLATION: ABOUNDING AMBIQUITIES

The principal federal tool used to exert control over aquaculture is the Fisheries Act, R.S.C. 1970, F-14 and regulations passed thereunder. As will be more amply shown later, there are a number of provisions under this legislation which by their clear words directly apply to aquaculture. Additionally there are a number of provisions which might, depending on how you resolve ambiquities in the wording, apply to aquaculturists. Possession limits and gear restrictions are examples. The principal focus of this section of the paper is on these matters. I conclude that present Canadian fisheries legislation does indeed view aquaculture as being a fisheries matter and thereby creates ambiquities concerning application. One might then ask if this is constitutionally justified; one might as well

wonder whether regardless of constitutional considerations it is wise policy to so view and treat aquaculture.

The long title of the Fisheries Act is "An Act Respecting Fisheries." What do we mean by the word "fisheries"? The Act itself contains four definitions which should be noted. Section 2 provides:

> "fish" includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals;
>
> "fishery" includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith;
>
> "fishing" means fishing for, catching or attempting to catch fish by any method;
>
> "fishing vessel" means any vessel used, outfitted or designed for the purpose of catching, processing or transporting fish; ....

It is clear that all aquacultural produce, except plants, fall within the definition of "fish." The definition of "fishery" is much more difficult, but it seems likely that the term, especially with its reference to "fishing appliance" is only intended to apply to the fishery as a public resource. The Supreme Court of Canada has twice noted the following definitions of "fishery":

> A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.
>
> and

> The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.[9]

These seem to embrace common notions of catching wild creatures rather than domestically growing or cultivating private property. Similarly the definition of "fishing" as "fishing" or "catching" must be restricted to conventional notions of a capturing rather than a harvesting activity. "Fishing vessel" has a little more ambiquity to it because it includes processing and transporting activities in addition to catching. A culturist might well use a boat for transporting fish. Is this boat a "fishing vessel"? Most likely no one intended to include a culturist. Probably the definition was formed simply so as to include "mother" ships or factory vessels.

A few examples will show the relatively serious problems entailed. Part IV of the British Columbia Fishery (General) Regulations is sub-titled "Fishing in Non-Tidal Waters." The application section (s. 56) provides:

> 56. This Part applies to fishing in the non-tidal waters of the Province and to fish caught in such waters.

Section 65(1) in that Part of the Regulations says that no person is to "engage in the breeding, holding or rearing of fish, except under a licence ...." Other provisions deal with such things as licencing the transport of live trout from "commercial fish farms to licenced private fish ponds" (s. 61(2)). Clearly the juxtaposition of these provisions shows that fish cultivation is regarded as a "fishing" activity in the B.C. Regulations. If a culturist is "fishing", then other provisions of the Regulation

dealing with possession limits or gear restrictions for those fishing may apply to him also.

An even more dramatic example is provided in the Manitoba Fishery Regulations. Section 39(1) states:

> 39(1) No person shall engage in commercial fishing except under the authority of a commercial fishing licence, commercial operator licence, commercial bait fish fishing licence, fish farming licence, general fishing permit or a restricted commercial fishing licence specified in Schedule II. [Emphasis added]

Obviously again a culturing activity is regarded as fishing. The definition section of the Regulation shows that the terms are used here with the same meaning as in the Fisheries Act.

Regard might also be had to the Saskatchewan Fishery Regulations. Section 3(2) tells us that "these Regulations do not apply to the taking or possession of fish from a water body licenced for the purpose of commercial or private aquaculture." While on one hand it is desirable to see clarification that these Regulations do not apply to aquaculture, on the other it suggests that, consistently with the situation in B.C. and Manitoba, without specific exemption these "fishing" regulations would have applied to culturists.

At least one recent case before the courts emphasizes problems of ambiguity with fisheries regulations. In this case, R. v. Young[10] the accused was charged that he did "fish with a net" without a licence contrary to the New Brunswick Fishery Regulations. The accused had used a dip net to take fish out of a gaspereau trap net belonging to someone

else. In holding that this did not amount to fishing, Mr. Justice Miller said:

> To relate these difficulties in interpretation to this particular case, it is alleged that the appellant "did unlawfully fish with a net."
>
> The word "fishing" is defined in section 2 of the statute as follows:
> 'fishing' means fishing for or catching fish by any method.
>
> Webster's New Twentieth Century Dictionary provides the following definition of the word "catch" as a verb:
> to seize, as in a snare or trap; to ensnare, to entangle.
>
> It seems clear to me that the fish retrieved by the accused had previously been caught or ensnared in the trap net of Mr. Maillet.
>
> The accused did not on the evidence as I read it "catch" the fish. He may have stolen them from Mr. Maillet's trap net, but he is not charged with theft.
>
> I am satisfied that on the narrow basis of the statutory meaning of "fishing" the accused did not catch any fish.

Miller, J. also went on to deal with the question of whether a licence was required to use a dip net to catch gaspereau and concluded, because a gaspereau dip net licence was not included in a schedule listing fees for licences and permits, that it was not. He states:

> There are so many ambiguities in the regulations that it would be dangerous to convict except on the most explicit contravention.

Examinations of the provisions of the Fisheries Act discloses the same tension. The first provision in numerical sequence to note is s. 4:

> 4. Nothing in this Act precludes the granting by the Minister of written permission to obtain fish and spawn for purposes of stocking or artificial breeding or for scientific purposes.

This section likely envisages obtaining the fish or spawn from the wild. Those taking wild fish are obviously engaging in "fishing," and so not much can be inferred from s. 4 about aquaculture as part of fisheries.

Section 7 states, in part:

> 7. The Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued, leases and licences for fisheries or fishing, wherever situated or carried on, ... [Emphasis added]

This provision should be cross-referenced with s. 34, which in clauses (f) and (g), authorizes Cabinet to make regulations respecting the issue, etc. of licences and leases and the conditions applicable to them. It is likely that the only licences the Minister may issue are those "for fisheries or fishing." Since the various fisheries regulations contain licencing provisions for aquaculture, aquaculture must be regarded as part of the fishery or a fishing activity.

The most specific provisions in the Fisheries Act dealing with aquaculture are ss. 44-46. They provide:

> 44. The Minister may authorize any river or other water to be set apart for the natural or artificial propagation of fish.
>
> 45. Special licences and leases for any term of years may be granted to any person who wishes to plant or form oyster beds in any of the bays, inlets, harbours, creeks or rivers, or between any of the islands on the coast of Canada; and the holder of any such lease or licence has the exclusive right to the oysters produced or found on the beds within the limits of such lease or licence.

> 46.(1) The Governor in Council may, upon such terms and conditions as are agreed upon, authorize the government of any province to grant leases of such areas of the seacoast, bays, inlets, harbours, creeks, rivers and estuaries of such province as the government of such province considers suitable for the cultivation and production of oysters, and any persons to whom such leases are granted by such province, subject to the fishery regulations of Canada, have the exclusive right to the oysters produced or found on the beds within the limits of their respective leases.
>
> (2) In the event of such areas, or any part thereof, being in a public harbour, nothing in this section prejudices the right or title of Canada to the enjoyment and use of such harbour for every purpose other than the cultivation and production of oysters.

Obviously ss. 45 and 46 assert federal control over oyster culturing as an exclusive private-property resource--both in terms of the power to grant exclusive leases or licences of subaquatic land and in terms of an exclusive right to oysters as private personal property. Section 44 is less clear in its intent. Setting aside areas for the propagation of fish certainly includes doing so to allow the public culturing of fish by government to enhance the public fishery. However, the words also seem broad enough to allow public waters to be reserved for private aquaculture, although many unanswered questions would be left, such as whether a lease of the area would be granted and would a lessee or licensee have an exclusive right to the fish.

These provisions, especially ss. 45 and 46, treat aquaculture as part of the fishery. If this assumption is correct, what then do we make of other provisions in the Fisheries Act that are clearly intended to apply to the public fishery? Might they also have an unintended impact on private aquaculture? For example, ss. 12, 13, 14 and 16 with respect to "Salmon

Fishing" use such words as "caught", "capture" and "killed". Section 16 says that in N.S., N.B. and P.E.I. "no salmon shall be fished for, caught or killed otherwise than by angling" within 200 yards of the mouth of any tributaries. Would a culturist killing his own salmon within this area be in technical violation of this prohibition? Section 19 prohibits the possession of fish during the closed season "without lawful excuse." A culturist would be in contravention of this unless he has a lawful excuse. The onus of proving this lies on the culturist. Section 2 defines "lawful excuse" as basically the "ability to prove that fish in possession during the close time thereof at the place of possession were legally caught" [Emphasis added]. If a culturist does not "catch" his own fish for the purpose of the salmon fishing prohibitions, can he "catch" them lawfully for the purposes of the possession prohibition? Or do the same words mean different things in different contexts? If the later, matters are somewhat confusing. For example, do culturists have to comply with s. 48, requiring, inter alia, the owner or manager of every fresh fish business, if requested, to furnish a true return showing "all fish caught", "all fish packed or canned," etc? Other questions that might be asked are: does a culturist require the authority of the Minister under s. 29 if his purpose is to convert his crops into fish meal or fertilizer; or under s. 30 if what he does is "destroy fish by any means other than fishing?"

The confusion in the Fisheries Act is magnified may times over by the provisions in the regulations. While some of the species covered in the regulations are not presently the subject of culturing activities (such as cod, haddock, halibut, narwhals and seals), some surprising candidates

emerge. An example is bluefin tuna, which are being penned, fed and kept for optimum introduction to the market in St. Margaret's Bay, N.S. The Bluefin Sport Fishery Regulations have provisions which prohibit the sale or possession of any bluefin less than 300 pounds in weight (s. 7) and the sale of any bluefin unless there is attached thereto a numbered tag issued by a fishery officer (s. 15). The Tuna Fishery Regulations prohibit anyone fishing for tuna from having in his possession any bluefin less than 6.4 kg. in weight. Presumably the St. Margaret's Bay operation is subject to these provisions with respect to acquiring individuals for their pens. Is there any reason why a culturist should not be permitted to keep undersized tuna for grow-out?

In any event, I will confine my remarks to species of some possible relevance to culturing activities, the reader of course realizing that the same observations could likely be made about any species regulated. In each of the following instances consider whether the provisions include aquaculturists and culturing activities.

1. The Atlantic Crab Fishery Regulations "apply to commercial fishing for crabs on the Atlantic Coast of Canada" (s. 3). Gear is restricted to crab traps (s. 4). There are size (3¼ inches in width), type (soft-shelled) and quota restrictions applying to anyone in possession of crabs (s. 9).

2. The Atlantic Fishery Regulations "apply to commercial fishing by persons on board Canadian fishing vessels ...." (s. 3). The Atlantic Fishing Registration and Licensing Regulations "apply to persons engaged in commercial fishing in water along the east coast of Canada" (s. 2.1). "Commercial fishing" is defined as "fishing for or catching fish or

harvesting marine plants, all or any portion of which are sold, offered for sale, traded or bartered" (s. 2). "Commercial fishing vessel" is defined to mean "any fishing vessel ... (b) that is used in processing fish, or (c) that is used in transporting fish" (s. 2). The Fisheries Act itself defines "fishing vessel" as "any vessel used ... for ... processing or transporting fish" (s. 2).

3. The Fishing Gear Marking Regulations "apply to the setting of fishing gear in the waters off the Atlantic coast or their dependant waters" (s. 3). "Fishing gear" means "any net, line or other gear used for catching fish" (s. 2). Note that the "Minister may, by order, exempt any fishing gear" (s. 12).

4. The Fraser River Sockeye and Pink Salmon Fishery Regulations state in several sections that "no person shall fish for sockeye or pink salmon" in certain areas, during certain times, by certain methods (ss. 4, 5, 6).

5. The Lobster Fishery Regulations provide that during the close time no one shall "fish for or have in possession any lobster without lawful excuse" and that at no time can you "fish for or have in possession any lobster" below a certain size (s. 3(1)). Similar provisions exist in respect of fishing for or having in possession lobster with eggs attached or less than 2½ inches in length (s. 3(3)). Other pure possession-of-undersize lobsters provisions exist (ss. 3(4), 4). Transportation of lobsters by a vessel without written permission from a fishery officer is prohibited (s. 4(5)).

6. The Pacific Commercial Salmon Fishery Regulations provide that "no person shall fish for, catch, kill or have in possession any salmon except

salmon taken in accordance with the provisions of these Regulations and the British Columbia Fishery (General) Regulations" (s. 5.1) and then go on to restrict the ways in which it is permissible to "fish for salmon for commercial purposes" (s. 5.3). There are gear restrictions applicable to gill nets used "in commercial fishing for salmon" (s. 9). There are also gear restrictions, close seasons and minimum size requirements which apply to those who "fish", or "fish for salmon", or while "fishing for salmon or having salmon aboard" or variations thereon (s. 11-27).

7. The Pacific Fishery Registration and Licensing Regulations "apply to

(a) the licensing of fishermen, and

(b) the registration and licensing of fishing vessels and gear for commercial fishing or packing ..." (s. 3)

Under s. 6(1)(c), "no person shall ... dig or take shellfish, unless he has a personal commercial fishing licence." There is no distinction made between areas open to public fishing and those under private lease. The regulations also deal with vessels used "for collecting, transporting, storing or holding fish" (s. 13, 14). Section 37 dealing with vessels purchased under a buy-back program speaks in terms which envisage "the collection and transportation of fish" as part of "commercial fishing operations." Schedule I to the Regulations also refers to a "Licence to fish for salmon in enhancement facilities" (item 4).

8. The Pacific Shellfish Regulations "apply in respect of fishing for shellfish" (s. 3). Sections 10 and 11 deal with abalone. Possession of undersized abalone is prohibited (s. 10(1)), as is possession within a certain distance of an island (Mitlenatch) in the Strait of Georgia

(s. 10(4)). Prohibitions on how, where, and when one may "fish for, take, catch or kill any abalone" also exist (ss. 10(5), 11(2) and 11(3)). Finally, anyone fishing for, taking, catching or killing abalone for commercial purposes must have an abalone licence. Size restrictions with respect to clams apply to persons who "dig for, take, have in possession or buy or sell" them (s. 13(1)), but anyone who is "engaged in sport fishing for his personal use may dig for, take or have in possession any clam of any size" (s. 13(2)). Persons wishing to use certain techniques for taking clams must be licensed (s. 13(4)). There is a one-hour moratorium (?) on digging or taking a bivalve mollusc from 2300 hours to 2400 hours on each December 31st (s. 13(6)) and there are geographical areas from which possession of clams is prohibited (ss. 13(7), (8) and (9)). There are minimum size limits that apply to possession of crab (s. 14(1)) as well as restrictions on the way they may be killed (s. 14(2)). There are geographical and seasonal limits that apply to persons who "fish for, catch or kill crabs for commercial purposes" and a close season on king crab that applies to anyone engaged in commercial fishing who has possession. Section 15 dealing with oysters is most significant. It contains prohibitions on the planting or introduction of oysters etc. into B.C., or transporting of oysters etc. from certian areas, or the taking or possession of oysters for commercial purposes, except under a permit from the B.C. Minister of Recreation and Conservation. An expressly stated exception to the permit requirement for taking or possession of oysters is "oysters taken from an area described in a registered oysters lease." While "registered oyster lease" is not defined, it undoubtedly refers to private leases under which

the lessee has the exclusive right to harvest oysters within the leased area. When this is combined with the application section (s. 3), it strongly suggests that a culturist harvesting from his leased area is "fishing for shellfish". There are also prohibitions applying to possession of shrimp (s. 16(3)) and sea urchins (s. 17(1)). With respect to shellfish contamination, no person is permitted to "fish for shellfish" in listed areas determined to be contaminated (s. 19(2)). There are other areas where the shellfish are toxic and "no person shall fish for, take, catch or have in possession shellfish from" such areas, except under a permit from the Minister (s. 19(5)).

9. The Tuna Fishery Regulations, which "apply to commercial tuna fishing" (s. 3), prescribe a close season in which "[n]o person shall fish for, transport, process or have in his posession any yellowfin" tuna (s. 5(1)). Minimum size limits are prescribed with respect to possession for those fishing for yellowfin (s. 7(1)) and bluefin (s. 8(1)) tuna.

10. The Sanitary Control of Shellfish Fisheries Regulations "apply to the shellfish fisheries of Canada" (s. 3). No one may, without a special permit, "fish for, dig or take shellfish from a contaminated area" (s. 5(1)(a)) or "transport shellfish for depuration" (s. 5(1)(b)). Section 6 empowers an inspector to "enter any shellfish area or any place where shellfish are kept and examine any such area or place and any facilities and equipment found therein that are used for fishing for, growing, transplanting, re-laying, transporting or storing shellfish." [Emphasis added]. The New Brunswick Fishery Regulations contain similar prohibitions

concerning contaminated areas, which apply to those who "fish for shellfish" (s. 20(1)).

11. The Alberta Fishery Regulations provide that "[n]o person shall have in his possession more fish of a species" named in a schedule than the number set out for that species in that schedule (s. 45(1)). The sub-title suggests that these limits are intended to apply to angling, spearfishing and bowfishing, but the operative words are not so limited.

12. The British Columbia Fishery (General) Regulations prohibit possession of "any sockeye, pink or chum salmon in or from the non-tidal waters of the Province" (s. 5(2)). Notwithstanding prohibitions on net fishing in certain areas, "fishing for shellfish by means of nets is permitted" (s. 19(3)).

13. The New Brunswick Fishery Regulations provide that "[n]o person shall fish for, catch or kill salmon except by angling or by means of gill nets, trap nets, pound nets or weirs" (s. 18(1)). As well, no one may "retain salmon with a net of any kind unless that person holds a limited fishery licence for salmon" (s. 18(2)). On the other hand, where a salmon is "retained for purposes of stocking or artificial breeding" it must have a brown salmon tag attached to it (s. 18(23)(d)). There are minimum size limits which apply to any one having clams "in this possession" (s. 21(2)). There also are restrictions on how one may "fish for clams" (s. 21(5)). Most interestingly, these Regulations contain provisions with respect to oysters which in some sub-sections specify public oyster-fishing areas (s. 22(1), (3), and (9)) while others specify leased oyster areas (s. 22(7) and (8)) or make no distinction (s. 22(2), (10), (11) and (12)). The wording suggest that those taking oysters from privately leased areas are

"fish[ing] for, catch[ing] or kill[ing] oysters." With respect to scallops, no one may "while using any self-contained underwater breathing apparatus, have in possession at any time more than one hundred scallops or portions thereof (s. 23(4)). With respect to trout, no one may "fish for, catch or kill" any except by angling (s. 27(1)) and a possession limit of 30 trout is imposed on every person (s. 27(2)).

14. The Newfoundland Fishery Regulations provide that, subject to two exceptions not relevant for our purposes, "no person shall fish for, catch or kill or attempt to fish for, catch or kill any fish in any inland waters other than by angling" (s. 10(1)). There is a prohibition against having in possession in an unpreserved state "more fish of any species taken in any inland waters than double the daily catch limit" (s. 13(4)). There is also a provision which provides that "[n]o person shall fish for, take, catch or kill or attempt to fish for, take, catch or kill trout or char by any means in any waters of Insular Newfoundland [the Island] otherwise than by angling" (s. 42). There are close times during which no one may "fish for, take, catch or kill" salmon or attempt such (s. 45(1)). In Northern Labrador one cannot "fish for, take, catch or kill salmon, char or trout otherwise than by angling, unless one has a commercial salmon fishing licence" and meets certain other criteria (s. 65(1)). Similar provisions apply in Southern Labrador.

15. The Northwest Territories Fishery Regulations, which apply as well in the tidal waters of Manitoba and Ontario, have provisions which relate to the commercial licensing of those desiring "to fish" (s. 14). There are

as well possession limits (s. 29(10)), although these seem intended to apply only to sport fishing.

16. The Nova Scotia Fishery Regulations provide that "[n]o person shall fish for, catch or kill salmon except by angling or by means of gill nets, trap nets, or pound nets" (s. 20(1)) and that "[n]o person shall fish for, catch or kill salmon with a net of any kind or retain any salmon so caught except under a salmon licence" (s. 20(1.1)). There are minimum-size limits that apply to all who "fish for, take, have in his possession or sell" various types of clams (s. 23). Section 24 dealing with oysters distinguishes between a "public oyster-fishing area" and a "leased oyster area." A "public oyster-fishing area" is defined to mean "any oyster-bearing area that is not under lease or otherwise closed to the public" (s. 2(1)). The wording of this section strongly suggests that those harvestng from leased areas are engaged in "fish[ing] for, retain[ing] or kill[ing]" oysters. Section 27, which also provides for the licensing of commercial trout breeding or rearing operations, provides that "[n]o person shall ship out of the Province at any one time a quantity of trout that exceeds the lawful daily catch" (s. 27(2)) and requires that anyone shipping out of Nova Scotia trout that he has caught accompany the shipment with a certificate issued by a fishery officer (s. 27(1)). Provisions relating to licensing and distance between weirs do not apply to weirs on "privately owned flats" in Annapolis (s. 28(5)) and Digby (s. 33(5)) Counties.

17. The Ontario Fishery Regulations provide that "[e]xcept as provided in these Regulations, no person shall fish for or take fish from any of the waters of the province" (s. 3(1)). There are specific exceptions relating

to closed seasons and daily catch limits on fishing preserves (s. 3(2)) and to using dip and seine nets on premises where a licence holder propagates bass and trout (s. 3(3)). Presumably these private activities amount to "fish[ing] for or tak[ing] fish" from waters of Ontario. There is a system of closed seasons, which apply to taking fish "by commercial fishing" (s. 4(2)). Minimum-size limits are set out prohibiting "possession without lawful excuse" relating to certain fish "taken by commercial fishing" in certain waters (s. 8(a)). Various other general possession limits are set out (s. 11(4), (5), and (6)). With certain minor exceptions, "no person shall, except under a licence prescribed therefor, take or attempt to take fish by any means "(s. 12(1)).

18. The Prince Edward Island Fishery Regulations provide that "[n]o person shall set or operate a seine of any kind except under a licence" (s. 11(1)) and has a similar provision covering trap or pound nets (s. 12(1)). Section 14 deals with close times, during which "no person shall fish." Some of the close times apply to "leased oyster fishing areas" (items 4(2) and (4)). No one may "fish for, catch or kill salmon except by angling or by means of gill nets, trap nets or pound nets" (s. 20(1)) and those killing salmon with a net must hold a salmon licence (s. 20(1.1)). Minimum-size limits exist for clams and there are limitations on the methods that many be used to fish for them (s. 23). Section 24 concerning oysters distinquishes between a "public oyster fishing area" and a "leased oyster area." "Public oyster fishing area" is defined as "any oyster-bearing area that is not under lease or otherwise closed to the public" (s. 2(1)). The wording of this section strongly suggests that those

harvesting from leased areas are engaged in "fish[ing] for, retain[ing] or kill[ing]" oysters.

19. The Quebec Fishery Regulations "apply to the seacoast and inland fisheries of the Province" (s. 3). "Subject to subsection (2) ..., no person shall fish unless he is the holder of a licence described in Schedule III" (s. 4(1)). Subsection (2) exempts residents who "fish or dig for clams with hand tools." There are prescribed seasons during which it is lawful to "fish" for various species (s. 8) and possession limits which apply to those "fishing" (ss. 9, 10). No one is permitted to "catch and retain, or have in his possession an anadromous Atlantic salmon less than 12 inches long" (s. 11(1)(a)). Fishing by skin diving (s. 15) and fishing in the winter (s. 16) are regulated, as are various matters concerning bait fish (s. 17). No one may "fish for, catch or kill anadromous Atlantic salmon by any means or retain such salmon without being the holder of a fishing licence for anadromous Atlantic salmon (s. 18(1.1)) and various controls related to fishing for Atlantic salmon are enacted (s. 18). There are minimum-size limits which apply to any one who fishes for, takes, possesses or sells clams (s. 25(5)). These Regulations also contain a specific reference to clams in any "public bed" (s. 25(8) and (9)), although there is no reference to private beds.

It is in my view apparent from the foregoing review that greater clarity in specifying whether such prohibitions as these apply to aquaculture is desirable and would be an important part of any legislative reform.

4. AREAS IN WHICH FEDERAL CONTROL ASSERTED

Much of the detail in this Section of this paper is contained in the summation sheets attached as Appendix II. These show legislative provisions applicable Canada-Wide and in each of the provinces. The purpose here is to show the full range of aquaculture-related controls contained in federal fisheries legislation. This will help to assess any constitutional problems and the feasibility of consolidation and uniformity. It should as well be appreciated that ambiquities exist concerning the application of some of these provisions to aquaculture. The areas regulated by the Fisheries Act (Canada) and regulations passed under it are:

1. Authorize, licence or permit fish farming.

Alberta Fishery Regulations:

> 60. No person shall propagate, breed, rear or keep live game fish or live game fish eggs in any waters of Alberta unless authorized by the Minister of the Department of Energy and Natural Resources of the Province of Alberta.

British Columbia Fishery (General) Regulations:
[Found in Part IV applying to non-tidal waters]

> 65(1) No person shall engage in the breeding, holding or rearing of fish, except under a licence from the Minister and in accordance with such conditions, not inconsistent with these Regulations, as are specified in such licence. [Goldfish, tropical fish or other exotic fish are exempt].

Manitoba Fishery Regulations:

> 39.(1) No person shall engage in commercial fishing except under the authority of a commercial fishing licence, commercial operator licence, commercial bait fishing licence, fish farming licence, general fishing

permit or a restricted commercial fishing licence specified in Schedule II.

57. No person shall, except for commercial purposes, retain live fish in any container or enclosure or in any body of water unless he holds a fish farming permit or licence.

Schedule II specifies in "Section 2—Commercial Fishing" as item 5 a "Fish Farming Licence", the fee for which is $15.00 and in "Section 3—Miscellaneous Permits and Licences" as item 5 a "Fish Farming Permit", which is free.

New Brunswick Fishery Regulations:

27.(7) No person shall engage in the breeding or rearing of trout for commercial purposes except under a permit from the Minister and in accordance with the conditions set out in that permit.

Nova Scotia Fishery Regulations:

27.(3) No person shall engage in the breeding or rearing of trout for commercial purposes except in accordance with the terms of a licence issued therefor.

Prince Edward Island Fishery Regulations:

27.(3) No person shall engage in the breeding or rearing of trout for commercial purposes except in accordance with the terms of a permit issued therefor.

Quebec Regulations:

2.(1) In thse Regulations, ... "hatchery establishment" means any establishment in which the rearing of fish takes place; ...

28.(1) In this section, "licence" means a licence to operate a hatchery establishment.

(2) No person shall operate a hatchery establishment without a licence.

(3) The Minister may issue licences for the operation of hatchery establishments of the following categories:

(a) Category I: hatchery establishments of a commercial type where the following operations are authorized in relation to fish species covered by the licence, namely,
(i) the rearing of breeding fish,
(ii) the extraction and the fecundation of the sexual products of fish,
(iii) the incubation of fish eggs,
(iv) the rearing of fish for restocking purposes,
(v) the rearing of fish for consumption purposes, and
(vi) the rearing of fish to be caught by angling in fishing ponds the operation of which has been authorized by provincial regulation; and

(b) Category II: hatchery establishments of non-commercial type where the following operations are authorized in relation to fish species covered by the licence, namely,
(i) the incubation of fish eggs, and
(ii) the rearing of fish for restocking purposes.

(4) Subject to subsection (5), any person may obtain a hatchery licence

(a) by making an application therefor to the Minister on the form prescribed by the Minister; and
(b) by paying the applicable fee prescribed by subsection (7).

(5) No hatchery licence shall be issued in respect of a hatchery establishment until the Minister has approved the site where the establishment is to be operated.

(6) The Minister may renew a hatchery licence from year to year upon production of an operation report for the preceding year.

(7) The fees payable for hatchery licences are as follows:
(a) for a Category I licence.....$50;
(b) Revoked P.C. 1978-1185
(c) for a Category II licence..... 10.

(8) The Minister may, at any time, order an inspection to be made of a hatchery establishment.

(9) The holder of a hatchery licence shall perform any treatment pertaining to parasitic or other diseases as required by the Minister, assume the cost of the treatment and, if required by the Minsiter, put his fish in quarantine.

(10) The Minister may cancel or suspend any hatchery licence if the holder does not comply with these Regulations.

(11) The holder of a hatchery licence shall display his licence in his hatchery establishment.

(12) No person shall rear, transport live or deposit fish in the waters of the Zones set out in Schedule XIV except

(a) in Zone II of the said Schedule, speckled trout, grey trout, Quebec red trout, ouananiche or anadromus [sic] Altantic salmon; or

(b) in zone III of the said Schedule, speckled trout, sea trout, grey trout, Quebec red trout, rainbow trout, brown trout, ouananiche, anadromous Atlantic salmon, hybrids of those salmonids or smallmouth bass.

(13) This section does not apply to hatchery establishments operated by the Government of the Province.

(14) Paragraph (12)(a) shall come into force two years after its publication in the Canada Gazette.

(15) No person shall introduce into Zone II of Schedule XIV fish or fish eggs of a species other than those mentioned in paragraph (12)(a).

(16) Notwithstanding subsection (12) but subject to section 17, bait fish may be reared, possessed and transported in Zones II and III of Schedule XIV.

(17) Notwithstanding subsection (12), rainbow trout may, with written authorization from the Minister, be possessed and transported live in Zones I and II set out in Schedule XIV for the purposes of biological tests, on condition that such trout are killed immediately on completion of the tests.

2. Oysters.

The Fisheries Act provides that the federal authorities may grant exclusive licences and leases to plant or form oyster beds, with the lessee having the exclusive right to any oysters produced or found on the beds (s. 45). The New Brunswick Fishery Regulations make specific reference to leased oyster areas, as well as public oyster areas (s. 22). Undoubtedly where no distinction between the two is made, the prohibitions would apply as well to leased as public areas. Thus, no one may "fish for, catch or kill oysters on Sunday or from sunset to sunrise on any other day of the week" (s. 22(2)), or "while fishing for or catching oysters in any waters, use diving equipment of any type" (s. 22(4)). There are also size limits that apply to anyone in possession of oysters (s. 22(5) and (6)), although unculled oysters may be taken to stock a leased area (s. 22(7)) and re-layed or replanted from one leased area to another (s. 22(8)). One may also, in certain areas, take oysters during May and June for re-laying (s. 22(11)) and during the spawning season to take oyster spat (s. 22(12)). The Nova Scotia Fishery Regulations provide for closed times during which "no person shall fish for any species of fish named in Column 1 of an item of Schedule III" (s. 15(1)). Schedule III contains as item 5(2) oysters in "[a]ll leased oyster areas." The Nova Scotia Regulations also distinquish between "public oyster-fishing areas" and "leased oyster areas" (s. 24). There is a general prohibition against fishing for, retaining or killing oysters less than 7.6 cm. across the shell (s. 24(2)), which is subject to certain

exceptions allowing unculled oysters to be taken under licence to stock a leased oyster area (s. 24(3)), and allowing undersized oysters to be taken from one leased oyster area for re-laying or replanting in another (s. 24(4)). A general prohibition against fishing for, taking or killing oysters on Sunday or from sunset to sunrise on other days of the week seems equally applicable to both leased and public areas (s. 24(5)). The Prince Edward Island Fishery Regulations have provisions like these in Nova Scotia, except that in addition they prohibit all persons from, "while fishing for or catching oysters in any waters, [using] diving equipment of any type" (s. 24(7)) and permit the lessee of an oyster area, under a licence issued by the Regional Director-General, during all or part of the May 1 to August 14 period, to take oysters of lawful size for summer marketing (s. 24(8.1)). In certain specified waters no one may fish for oysters (s. 24(9)), except "a person who fishes for oysters in an area leased from the Minister [of Fisheries and Oceans]" (s. 24(10)).

3. Digging or Taking Shellfish.

The Pacific Fishery Registration and Licensing Regulations require anyone who digs or takes shellfish to have a personal commercial fishing licence (s. 6(1)(c)).

4. Closure of contaminated or toxic shellfish areas.

The Pacific Shellfish Regulations regulate these matters (s. 19).

5. Shellfish contamination.

The Sanitary Control of Shellfish Fisheries Regulations prohibit the taking of shellfish from areas declared to be contaminated, or the

transporting of shellfish for depuration, without a special permit (s. 5). Inspectors are empowered to enter and examine any shellfish area or place where shellfish are kept, including facilities and equipment "used for fishing for, growing, transplanting, re-laying, transporting or storing shellfish" (s. 6). Similar provisions with respect to contaminatied areas and depuration exist in some province-specific fishery regulations, i.e. New Brunswick Fishery Regulations, s. 20; Nova Scotia Fishery Regulations, s. 22; Prince Edward Island Fishery Regulations, s. 22; Quebec Fishery Regulations, s. 25(2) and (3). There appears to be unnecessary overlap (ie. redundancy) in the provisions dealing with shellfish contamination.

6. Geographic limitations on siting of aquaculture.

The B.C. Fishery (General) Regulations provide that with the exception of those fishing for roe-herring, "[n]o person shall use nets of any kind to enclose any bay, cove or inlet" (s. 23). As well no one may "trap or pen fish on their spawning grounds or in any river or stream leading to such spawning grounds" (s. 30(3) and also 66(1)(i)).

7. Setting apart waters for natural or artificial propagation of fish.

This is authorized by s. 44 of the Fisheries Act. It is an offence to fish in or injure or destroy places set apart by the Minister for fish propagation (Fisheries Act, s. 56). Some province-specific regulations also prohibit fishing in waters set apart for the propagation of fish, eg. Alberta Fishery Regulations, s. 59(k) and Manitoba Fishery Regulations, s. 17(b).

8. Fish Health.

The Fish Health Protection Regulations apply to the import of both live and dead cultured fish and their eggs and the eggs of wild fish (ss. 2 and 3). "Import" means "bring into any province of Canada from any other country or any other province of Canada" (s. 2), while "cultured fish" is defined as "a fish listed in Schedule 1 that is propagated by man in a fish culture facility and includes the eggs of such fish" (s. 2). Schedule 1 specifies all species and hybrids of the family Salmonidae. An import permit is required (s. 3). This is not to be issued unless a certifcate relating to the disease-free status of the source has been issued and any disease indicated "will not be harmful to the protection or conservation of fish in the province of importation" (ss. 5, 6).

9. Public fishing in areas covered by [exclusive] lease or licence.

The Fisheries Act provides that the permission of the occupant of an area under a lease or licence is required before anyone can fish for, take, catch or kill fish in the area (s. 21).

10. Barriers or screens to prevent escape of fish held for breeding purposes.

The Minister may authorize the placing and maintaining of such barriers, screens or other obstructions in streams (Fisheries Act, s. 24(3)).

11. Lobster pounds.

The Fisheries Act, s. 18 requires that pounds or enclosures where legally caught lobsters are retained for sale during the close season be licensed. Lobsters taken out and disposed of during the close

season require a certificate from a fishery officer or fishery guardian. As well, s. 18 also requires the pound to be marked with the name and number of the licensee. The owner or operator of a lobster pound or enclosure must release any lobsters he finds from time to time with eggs attached (Lobster Fishery Regulations, s. 6(1)). Possession of undersized lobsters is also prohibited (Lobster Fishery Regulations, ss. 3(1)(b) and (3)(b)).

12. Method of killing fish.

The Fisheries Act prohibits the use of explosives (s. 25). There are other such provisions which on their face apply to culturists. For example, the New Brunswick Fishery Regulations prohibit jigging or spearing in non-tidal waters (s. 7(3)(a)) and possession of a net or seine unless certain commercial fishing licences are held (s. 7(3)(c); see also s. 10(1)).

13. Protection against predators.

The B.C. Fishery (General) Regulations provide that "a person who is ordinarily engaged in fishing as his principal means of livelihood may, for the purpose of protecting his fishing gear and fish caught thereby, kill a harbour seal or sea lion in the vicinity of such gear" (s. 10(3)(b)).

14. Gear identification.

Manitoba Fishery Regulations;

> 42. The holder of a ... fish farming licence or fish farming permit shall have all the fishing gear used by him, other than angling gear, legibly marked at all times with the number of his licence or permit.

15. Stock Protection.

Saskatchewan Fishery Regulations:

42.(2) No person shall ...

(b) remove fish from a net, trap or fish holding device or tamper with any net, trap or fish holding device without permission of the owner; ...

16. Put Fish Food in Water.

Alberta Fishery Regulations:

59. No person shall

...

(j) deposit any meat, bones or other food for fish in any waters ...

17. Closed seasons.

Schedule II of the New Brunswick Fishery Regulations specifies closed seasons for leased oyster areas in different part of the Province (items 7(2), (3) and (5)).

Schedule III of the Nova Scotia Fishery Regulations specifies closed seasons for "all leased oyster areas" (item 5(2)).

Schedule II of the Prince Edward Island Fishery Regulations specifies closed times for "leased oyster fishing areas" (items 4(2) and (4)).

18. Importation, introduction, or transportation of fish or eggs.

Alberta Fishery Regulations:

59. No person shall

(a) import live game fish or live game fish eggs into Alberta unless authorized by a permit issued by the chief fishery officer;

(b) put live fish in any waters of Alberta except the waters from which they were taken;

(c) put live fish eggs into any waters of Alberta ...

British Columbia Fishery (General) Regulations:

7.(1) No person shall transport salmon, game fish or marine animals within or export any such fish from the

Province except under authority of a licence issued by a fishery officer.

(2) This section does not apply to a person who transports
...
(c) game fish that have been artificially propagated
...

26.(1) Subject to subsection (2) [Indian for food], no person shall send, ship, bring or cause to be sent, shipped, brought or carried, any salmon or steelhead trout caught above a commercial fishing boundary to any place below the boundary.

27. Except under authority of the Minister, no person shall
(a) introduce any fish, live fish or fish eggs into any waters of the Province; or
(b) transport within the Province any live fish or fish eggs.

60. A person who is authorized by a licence issued by the Director may,
...
(b) transport within the Province live fish other than salmon and fish eggs;
(c) remove from non-tidal waters and transport within the Province aquatic invertebrate organisms; ...
(e) release fish into non-tidal waters of the Province.

60.(2) Live trout may be transported within the Province from licensed commercial fish farms to licensed private fish ponds under a licence from a fishery officer.

65.(3) No person engaged in the breeding or rearing of goldfish, tropical fish or other exotic fish shall release them into any non-tidal waters of the Province.

66.(1) No person shall
...
(l) remove from the waters of the Province or transport within the Province any live aquatic invertebrate organisms other than insect larvae or crayfish;
(m) introduce to the waters of the Province any live aquatic invertebrate organisms.

Manitoba Fishery Regulations:

17. No person shall
(a) place any live fish or fish eggs in any waters other than the waters in which the fish or fish eggs were taken except as authorized by a licence or permit; ...
(g) import into or accept into Manitoba any live fish intended to be used for the purpose of catching fish.

19. Where the Minister, in a notice published in the Manitoba Gazette, specifies a species of fish that shall not be imported into, transported or possessed within the province or released into any waters in the province, no person shall import into or transport or possess within the province or release into any waters in the province that species of fish.

53. No person shall
(a) transport live fish;
(b) transfer live fish from one body of water to another; or
(c) retain live fish in an enclosure for fishing purposes, unless he holds a live fish handling permit.

54. The holder of a live fish handling permit shall not transfer live fish from one body of water to another unless the transfer is supervised by a conservation officer.

New Brunswick Fishery Regulations:

7.(8) No person shall, except with the written permission of the Minister, introduce into any waters of the Province or into any tidal waters adjacent to the Province any fish that is not native or indigenous to those waters.

(10) Subsection (8) does not apply to shellfish taken from the coastal waters of the Provinces of Nova Scotia and Prince Edward Island.

8.(8) No person shall retain alive any sport fish taken by angling.

22.(10) Except with the authority of the Minister, no person shall place in the waters of the Province any

oyster or oyster shell taken outside those waters or the waters of Prince Edward Island or Nova Scotia.

Newfoundland Fishery Regulations:

5. Except with the permission of the Minister, no person shall introduce non-indigenous fish into any waters of the Province or transfer any fish from any waters of the Province to any other waters of the Province.

24. No person shall retain alive any sport fish taken by angling in any inland waters.

Northwest Territories Fishery Regulations (applies to tidal waters of Manitoba and Ontario as well):

6.(1) No person shall
(a) Revoked P.C. 1982-2625
(b) introduce live fish or live fish eggs into any waters except under the authority of a permit issued by the Minister.

(2) The Minister may issue a permit referred to in paragraph (1)(b) if he is satisfied that the introduction of the fish or fish eggs referred to in that paragraph will not have any detrimental effects on the fish populations in the waters into which such fish or fish eggs are introduced.

Nova Scotia Fishery Regulations:

17.1(1) No person shall, except under authority of a licence,
(a) introduce into the waters of the Province, except the waters of Cape Breton Island, any fish, including shellfish that is not indigenous to those waters; or
(b) introduce into the waters of Cape Breton Island
(i) any shellfish that is not indigenous to those waters, or
(ii) any shell from any such shellfish.

(2) Notwithstanding subsection (1), shellfish taken from the waters of New Brunswick and Prince Edward Island may be introduced into any of the waters of the Province except the waters of Cape Breton Island.

27.(2) No person shall ship out of the Province at any one time a quantity of trout that exceeds the lawful daily catch.

Ontario Fishery Regulations:

18.(1) No person shall, except with the written consent of the Minister,

(a) import or bring any live fish or spawn into Ontario for the purpose of placing them in any of the waters of Ontario;

(b) import or bring into Ontario any live bait fish or piranha (Serrasalmus sp.); or

(c) transfer any fish or spawn from any body of water to another body of water within Ontario.

20.(1) No person shall ship or transport or cause to be shipped or transported, or receive or possess for shipment or transport, any fish caught, taken or killed within Ontario at a time or in a manner prohibited by these Regulations.

(2) Except with the written consent of the Minister no person shall export or take from Ontario any live fish, including bait, taken by any means.

60.(1) No person shall take any fish or spawn from Ontario waters or have such fish or spawn in possession for the purpose of stocking, artificial breeding, or for scientific or educational purposes, except under the written authority of the Minister.

(2) Notwithstanding anything contained in these Regulations, the Minister may, subject to such conditions as may be imposed by him in writing, permit ...

(b) the removal from any specified waters of any specified species of fish.

Prince Edward Island Fishery Regulations:

7.(1) Except under a permit, no person shall introduce into the waters of the Province any fish that are not native or indigenous to those waters.

(2) Subsection (1) does not apply to shellfish taken from the coastal waters of the Provinces of Nova Scotia and New Brunswick.

24.(11) No person shall place in the waters of the province any oysters or oyster shell taken outside the waters of the Provinces of Prince Edward Island, Nova Scotia and New Brunswick.

27.(1) Subject to subsection (2) [relating to non-residents fishing for trout in the waters of the Province], no person shall export any trout from the Province.

Quebec Fishery Regulations:

12.(1) Subject to section 17 [relating to bait fish], no person shall transport
(a) live fish, or
(b) fish eggs intended for hatching or stocking purposes
unless he has a permit therefor in writing from the Minister or a receipt showing the purchase of the fish or eggs.

13. No person shall, except under a permit in writing from the Minister,
(a) transfer live fish from waters in which they are caught to other waters;
(b) catch fish and keep them in a pond for the purpose of extracting their eggs for breeding or restocking;
(c) extract fish eggs for the purpose of breeding or restocking; or
(d) deposit anywhere fish eggs or live fish.

14.(1) Subject to subsection (2), no person shall, except under a permit in writing from the Minister, bring into or export from the Province live fish or live fish eggs for the purpose of rearing or stocking or for use as bait.

(2) Subsection (1) does not apply to exotic fish or to fish that are unable to survive naturally in the waters of the Province.

(3) Subject to subsection (4) [revoked], no person shall ship out of the Province dead fish
(a) of the species named in paragraphs 7(1)(a) to (k) [all trout and bass except rainbow trout]; or
(b) of other species the sale of which is prohibited by a provincial regulation.

25.(4) No person shall ship out of or take from the Province any clams that are not shucked or canned.

Saskatchewan Fishery Regulations:

42.(1) No person shall, except as authorized by a licence, or with the written permission of the Minister,
(a) take fish or fish eggs from any waters of the Province;
(b) import into the Province any live bait, live fish or live fish eggs;
(c) transfer or introduce any live fish or live fish eggs from one body of water to another body of water; ...

Yukon Territory Fishery Regulations:

9.(3) The introduction of live fish or fish eggs into the Yukon Territory, the possession of live fish or fish eggs, or the transfer of live fish or fish eggs from one body of water to another within the Yukon Territory, except by special permission of the Minister, is prohibited.

19. Collecting shellfish spat.

Nova Scotia Fishery Regulations: [applying only in Inverness County]

37.(10) No person shall fish for, take or collect any shellfish or shellfish spat, or maintain or place spat collecting equipment in
(a) that portion of Estmere Bay known as Portage Inlet above the Railway bridge, or
(b) that portion of River Denys Basin known as Gillis Cove, except under a special permit issued by the minister.

20. Export of fish.

The Pacific Commercial Salmon Fishery Regulations prohibit the "export from Canada [of] any sockeye or pink salmon unless it is canned, salted, smoked, dried, pickled or frozen and has been inspected in accordance with the Fish Inspection Act" (s. 6). There are also

requirements that must be met before frozen sockeye or pink salmon (s. 7(11)) or female salmon roe (s. 7(2)) may be exported.

21. Export of clams and geoducks.

The Pacific Shellfish Regulations regulate the "export from Canada [of] raw or fresh clams" (s. 20) and geoducks (s. 20.1).

22. Sale of fish.

Alberta Fishery Regulations:

> 56. No person shall sell, trade or barter, or offer to sell, trade or barter any fish caught in any of the waters of Alberta, except fish taken under the authority of a zone commercial licence or a zone fisherman's licence.

British Columbia Fishery (General) Regulations:

> 37. No person shall buy, sell or barter fish or portions of fish unless the fish were lawfully caught under a commercial fishing licence.

Manitoba Fishery Regulations:

> 16. No person shall sell, trade or barter or offer to sell, trade or barter fish, except those taken under a licence or permit authorizing the sale of fish.

Newfoundland Fishery Regulations:

> 25. No person shall buy, sell or offer for sale or use for any commercial purpose any fish, other than smelt or eels, taken in any inland waters.

Northwest Territories Fishery Regulations (applies as well to tidal waters of Manitoba and Ontario):

> 5.(4) No person shall buy, sell, trade or barter, offer for sale, trade or barter or accept in trade or barter any fish unless the fish was caught under the authority of a commercial licence.

Ontario Fishery Regulations:

29.(1) Licences other than angling licences include ...
(i) a licence to sell bass or trout; ...

Sasktachewan Fishery Regulations:

42.(2) No person shall ...
(e) sell, trade or barter, or offer for sale, trade or barter, any fish except fish taken by commercial fishing or bait fishing; ...

Yukon Territory Fishery Regulations:

9.(4) No person shall buy, sell, barter or attempt to buy, sell or barter fish or portions thereof unless the fish were lawfully caught under authority of a commercial fishing licence.

23. Shipping Certificates.

New Brunswick Fishery Regulations:

5.(1) No person shall ship or offer for shipment during the closed season for any fish, any container of that fish, whenever taken, unless the container is accompanied by a certificate issued by a fishery officer, or a statutory declaration by the person shipping the fish or offering the same for shipment, that the fish were taken otherwise than during the closed season therefor.

Shipping out of the province trout one has caught requries a certificate (s. 27(5)).

Nova Scotia Fishery Regulations:

s. 5 [virtually identical to N.B. provision]

Prince Edward Island Fishery Regulations:

s. 5 [virtually identical to N.B. provision]

24. Sanitary Product.

Alberta Fishery Regulations;

> 50.(1) No person shall
> (a) pack or ship any fish that are not in fit or satisfactory condition for human consumption unless authorized to do so by the chief fishery officer; or
> (b) pack or ship any fish in an unsanitary or unclean box.

Manitoba Fishery Regulations:

> 43. A person fishing under the authority of a licence or permit that authorizes the sale of fish for human consumption shall not handle, transport or store fish in a manner that, in the opinion of a fishery officer, is unsanitary and will result in the deterioration or spoilage of those fish.

25. Marine plants.

Sections 34.1 to 34.5 of the Fisheries Act deal with the harvesting of marine plants. Each section uses words like "harvest" or "harvesting" to describe what is being licensed or controlled. "Harvest" is defined in s. 34.4 to include "cut, take, dredge, rake or otherwise obtain." The Atlantic Coast Marine Plant Regulations say in s. 3 that they "apply to the harvesting of marine plants from the waters off the coast" of N.B., N.S. and P.E.I. but "do not apply to the manual harvesting of any Irish Moss, wire weed or horsetail that has become detached." The Pacific Coast Marine Plant Regulations do not use similar terms to these in the Atlantic Coast Regulations in its application section, but all the operative provisions use the word "harvest" to describe what is being controlled. Do these provisions apply where the subaquatic lands in which the plants grow are

privately owned? Should the private owner be cultivating the plants so as to promote a better yield, or be planting plants, would the "harvest" of his private crop fall within these provisions? If plants are being grown inside pens or by attaching themselves to artificial mediums introduced for that purpose (like the rope culture of oyster from floating rafts), would gathering these crops be "harvesting"? The words in the above-noted definition in s. 34.4 of the Fisheries Act seem broad enough to embrace these situations. Is this what is intended?

26. Exemptions for aquaculture.

Manitoba Fishery Regulations:

> 22. This Part [Part II on Sport Fishing] does not apply to a person fishing in waters for which a fish farming licence or permit is in force.

New Brunswick Fishery Regulations:

> 22.(7) Notwithstanding subsections (5) and (6) [dealing with minimum size limits], for the purpose of stocking a leased oyster area and under special permit, unculled oysters may be picked and taken from an area specified in that permit during the period from May 1st to September 30th, both days inclusive, in any year, or such lesser period as may be specified by the Regional Director.
> (8) Notwithstanding subsection (5), oysters of any size may be taken from a leased oyster area for re-laying or replanting in another leased oyster area during the period from May 1st to September 30th, both dates inclusive, in any year.

Ontario Fishery Regulations:

> 3(3) The holder of a licence to propagate bass and trout may use a dip net or seine net without the

authority of a licence therefor on the premises where he propagates bass or trout.

Quebec Fishery Regulations:

> 4.(9) No person shall have a fishing net, night-line, seine or hoop-net in his possession unless he holds the appropriate licence described in Schedule III or a licence to operate a hatchery establishment.
>
> 5.(3) The Minister may issue to any persons engaged in activities of an educational nature or in biological management or research a special licence exempting, subject to the conditions set out therein, the licensee from the requirements of these Regulations.
>
> 7.(2) Subsection (1) [prohibiting fishing for certain sports species except by angling or skin-diving] does not apply to the fishing for rainbow trout in rainbow trout fish ponds.

Saskatchewan Fishery Regulations:

> 3.(2) Notwithstanding subsection (1) [stating that the Regulations apply to all parts of the Province], these Regulations do not apply to the taking or possession of fish from a water body licensed for the purpose of commercial or private aquaculture.

5. CONSTITUTIONAL PROBLEMS WITH SUBJECT AREAS PRESENTLY CONTROLLED

A few of the preceding matters over which federal legislative power is asserted may pose constitutional problems. If I am correct in my suggestion that the federal government has over-extended its legislative embrace, it follows that any restructuring of federal aquaculture legislation must take account of these limitations and thereby stay within proper constitutional bounds. The points of particular concern are the following:

1. Setting aside areas for artificial propagation of fish.

Setting aside areas as fish sanctuaries for the purpose of enhancing natural propagation poses no constitutional problems:

fishing is prohibited and this is clearly part of the jurisdiction over sea coast and inland fisheries (Constitution Acts, 1867-1982, s. 91(12)). In such areas other activities may be carried on. However, where artificial propagation is intended one is inclined to think of hatcheries or other facilities forming part of or located on land, be it subaquatic or otherwise. The federal government could not do this without owning, or expropriating, the land. This would as well be the case where the object of the exercise was to allow private aquaculture. I am not aware of the power to set aside such areas being used for these purposes, and so, while the section may be overly broad in its wording, it appears to be a power that may be ignored with respect to legislative reform aimed at private aquaculture.

2. Oyster leases, licences and controls in leased areas.

The federal government has asserted power to regulate fully private oyster farming. Entwined in this assertion of jurisdiction are two particularly troublesome areas: the power to lease or give exclusive licences in relation to specifically defined areas of subaquatic land, and the power to confer an exclusive personal property right in all oysters found in the leased or licenced area. The first power assumes the lands in question are federal: one cannot lease or give exclusive rights in relation to something if one does not have these things in the first place. A grantor can only grant what he has. Second, the creation of or definition of property rights, at least in relation to lands or objects within provincial boundaries, is in all likelihood an area within exclusive provincial

jurisdiction. It is likely properly regarded as a matter of "property and civil rights in the province" (Constitution Acts, 1867-1982, s. 92(13)). As well it would follow from the fact that the oysters are the subject of private property rights that they form no part of the public fishery resource and so there is, it would seem, no fisheries justification for federal regulation of, for example, the methods by which they are harvested or size limits.

3. Aquaculture licences.

The power to licence, or permit, an activity has as its corollary the power to prohibit it, and the power to permit upon conditions. Aquaculture in some respects might have an adverse impact upon the wild fishery, as a public resource. For this reason, and to this extent, federal regulation of aspects of aquaculture is justified. However, as I see it and have expressed elsewhere,[11] the central feature of private aquaculture is its private property connections, both real and personal. Certainly the leasing aspects (except for federal government property) and the creation of personal property interests are provincial. Whether this means that licensing is therefore exclusively provincial is debatable. In all likelihood, the truth here is halfway in between, i.e. that the power to require a licence is both provincial and federal. The provinces can do it, if for no other reason, to raise revenue for provincial purposes. Additionally, provincial licensing can be justified as a means of regulating local business, local land use, and to protect the environment of the province. Similarly, the federal government could justify

licensing as a means of control imposed to protect the native, wild fishery. The problem with this justification is that the federal concerns can be met without imposing a general licensing scheme. This might be done by systems of disease inspection and species approval. I have discussed elsewhere how integrating these concerns might be undertaken.[12]

4. The Sale of Fish.

Once wild fish are caught and killed they become the subject of private personal property rights. Dead cultured fish are in the same position, as are cultured fish when alive. As items of personal property, they are able to be sold and dealt with as other objects of commerce. The trade and commerce power in the Constitution Acts, 1867-1982, i.e. s. 91(2), has been interpreted to confer on the federal government the power to regulate interprovincial and international trade, and trade generally, while the provinces can regulate local trade within the province, including particular trades. An outright prohibition on the sale of fish by the federal government seems to offend against the right of the provinces to regulate the sale of fish locally. This interference might be justified on the basis that its real purpose is to diminish the pressure on wild stocks by diminishing the value of the dead fish. In this way no one has the incentive, at least lawfully, to take these fish. Whether this is the justification I am not sure; nor do I know whether it would be sufficient. It may be that the interference with local trade is too direct

and too complete to be regarded as incidental to conservation of the wild stock.

5. Marine Plants.

Federal control has only been asserted with respect to "harvesting" marine plants. It is presumed, although this cannot be said categorically, that "harvesting" does not include "culturing" and thus anyone deliberately growing marine plants does so unregulated. It is conceivable though that anyone growing marine plants that are attached to subaquatic lands would, when he went to cut and collect them, be "harvesting". This is the analogous problem to deciding if the "culturing" of fish is embraced in "fishing" regulations. If the plant culturist comes within the harvesting regulations, it is pertinent to ask the same questions as with respect to aquaculture licences, i.e. is this not really property regulation and so provincial? However, even going beyond this, how is it that marine plants are part of sea coast and inland fisheries? More particularly, does control of marine plants growing on subaquatic lands not follow ownership of the land? I have said elsewhere that the position is like that for standing timber and growing crops--ownership of them follows ownership of the land they grow on.[13] There seems to be no reason or precedent to suggest a different rule applies when the land is underwater. Thus, if subaquatic land from which marine plants are to be cut is provincially owned, or privately owned but within provincial boundaries, then one would expect the right to regulate the taking of that property to be provincial. The only justification for federal

control would seem to be based on either wild marine plants being part of "sea coast and inland fisheries" or control of them being necessarily incidental to protection of the wild fisheries resource.

6. Intra-provincial transport of live fish or eggs from one aquaculture facility to another.

Some province-specific regulations cover the above activity, e.g. British Columbia Fishery (General) Regulations, s. 60(2); Manitoba Fishery Regulations, s. 53(a); Quebec Fishery Regulations, s. 12(1)(a). If this activity is seen as posing a threat to the wild fishery, regulation is justifiable. However if this rationale is found wanting, then it is difficult to see how federal regulation can be constitutionally supported.

7. Closed seasons.

In N.B., N.S. and P.E.I. there are closed seasons that apply to leased oyster areas. The rationale for this restriction must, I believe, be connected to the wild oyster fishery in order to withstand constitutional scrutiny.

6. ADMINISTRATIVE PRACTICES

An effort was made during the course of this review to ascertian what practices or policies were followed in connection with the administration of aquaculture regulations. This was done by mailing a letter (Appendix III) to a host of federal and provincial officials (Appendix IV) that outlined the information requested and enclosed a summary of the data assembled to that point in time. While the recipients were generally in

cooperative in responding, little hard information on federal administrative practices was obtained.

One document, at least, outlining federal administrative practices does exist. This is the Fish Health Protection Regulations: Manual of Compliance,[14] which I understand is presently in the process of revision. The one practice required by this Manual that appears to have no basis in the Regulations (or other legislation) is surface disinfection of eggs prior to shipment. A particular procedure for doing this is recommended (p. 27). The Manual itself recognizes that the requirement is "not specified in the Regulations" (p. 6). It was this kind of discrepancy I had hoped to pick up in seeking information on administrative practices.

One other point to note concerning the Manual is inclusion in it of a series of other procedures dealing with sampling (pp. 9-12), transportation of samples (p. 13), treatment of samples (p. 14) and the detection of bacterial fish pathogens (pp. 15-19), filterable agents including VHS, IHN, and IPN Viruses (pp. 20-23) and myxosporidian spores (pp. 24-26). These procedures tell the Fish Health Official how he is to determine the presence of disease. What is the status of these particular procedures rather than others which might be used? The full answer seems to be that these procedures have official sanction, while others do not, so that following them means that the source, the fish and the eggs were "inspected in an approved manner" as required by s. 6 of the Regulations. In other words, the Regulations authorized administrative officials to set up an approved method of inspection. Thus, these administrative practices are not in conflict with the Regulations but are specifically authorized by them.

In Ontario, I am told by A.S. Holder, Director of the Fisheries Branch in the Ministry of Natural Resources, present practice is to restrict the importation of live fish and eggs and only consider importations for research purposes. This seems to suggest that as a matter of administrative practice all importation of salmonids for culturing purposes is prohibited. Cases from other areas of law distinquish between prohibition and regulation. It may well be that the Fish Health Protection Regulations do not authorize prohibiting the importation of live fish and eggs that meet the technical requirements of the Regulations and the Manual of Compliance. In other words, it is arguable that a culturist who desires to import salmonids of an approved species that meet fish health criteria has a right to import them which cannot be denied by the exercise of administrative discretion.

Another interesting point concerning administrative practices is that in Prince Edward Island it is possible, I am informed by Irwin Judson of the P.E.I. Department of Fisheries and Industry, to obtain a "Conditional Mussel Culture Permit." This allows a mussel culturist to defer surveying the area assigned to him for a year while he determines if mussel culture can be successfully carried on in his chosen location. This Permit seems to be federally granted. I am unaware of any legislation allowing the grant of such a conditional permit. Indeed, I cannot ascertain the legislative support for any form of mussel or other shellfish culturing permit (except an oyster licence). The P.E.I. Fishery Regulations speak only in terms of a permit to "engage in the breeding or rearing of trout for commercial purposes" (s. 27(3)). The Fisheries Act, s. 45 deals only with an oyster licence or lease.

In British Columbia it has been the practice to require a federally granted licence to culture salmon and trout in tidal waters. There appears to be no legislative authority for such a licence. Section 27 of the B.C. Fishery (General) Regulations requries permission before fish can be introduced in tidal waters, but this hardly authorizes a licencing requirement for the culturing activity itself. Section 65(1) of these Regulations does authorize a fish culturing licence, but this provision is found in Part IV of the Regulations, which applies "to fishing in non-tidal waters of the Province and to fish caught in such waters" (s. 56). I am told the practice now is to no longer require such a licence in tidal waters because of uncertainty over the propriety of this requirement.

7. UNIFORMITY, REDUNDANCY, INCONSISTENCY

As is apparent from reading the preceding sections, problems with respect to uniformity, redundancy and inconsistency exist. For example, on the question of uniformity, there is a fairly wide variation from province to province in whether a particular activity is dealt with, e.g. aquaculture itself and its licensing, how it is dealt with, e.g. importation, introduction and transportation of fish or eggs, and the specific choice of words, e.g. sale of fish. On the question of redundancy, it appears that some of the matters covered in the Sanitary Control of Shellfish Fisheries Regulations are duplicated in each of the N.B., N.S., P.E.I. and Quebec Fishery Regulations. Inconsistent regulations are not readily apparent, although the previous analysis on whether fishery regulations include aquaculture showed some inconsistency and inadvertence in the way this question was treated. All of these problems can be addressed and resolved through a

process of singling out aquaculture for its own consolidated legislation as will be outlined in section 9 of this paper. If this task is undertaken through consolidation it will likely require a specific excepting out of aquaculture from the various regulations affected, and perhaps the Fisheries Act itself.

8. NON-FISHERIES LEGISLATION PERTINENT TO AQUACULTURE

While the principal purpose of this paper is to review the federal Fisheries Act and regulations passed under it, a number of other statutes and regulations were also considered. These are included in the list set out as Appendix I, and I will refer to them by the subject areas covered.

1. Insurance

Included in the items reviewed are the Crop Insurance Act, the Crop Insurance Regulations, the Fishing Vessel Insurance Regulations (passed under the Appropriation Acts), the Pesticide Residue Compensation Act and the Pesticide Residue Compensation Regulations. The thrust of all of these is the same: to shift some of the risk posed by events beyond the food producer's control away from him. Thus the government itself sets up insurance schemes to provide at reduced premiums insurance coverage to fishing vessel operators and farmers. As well, farmers can be compensated if their produce is contaminated by the presence on it of an approved pesticide used in accordance with prescribed practices. The parallels to aquaculturists is obvious. Since the cost of insuring cultured stock by a commercial underwater is reputedly high, a form of "crop" insurance for aquaculturists might be set up. Similary, if aquaculture stock becomes contaminated from

causes beyond a culturist's control, he might be compensated. There appears to be no constitutional problem with the federal government spending money to underwrite such voluntary schemes.

2. Disease.

The Animal Disease and Protection Act and regulations under it deal with animal diseases. The definition of animal does not appear to include fish. Similar matters seem to be covered by the Fish Health Protection Regulations and the Sanitary Control of Shellfish Fisheries Regulations. The notable difference under the Animal Disease and Protection Act is that express provision is made for destroying diseased animals (s. 11) and providing compensation to their owners (s. 12).

3. Feed

The Feeds Act and Feeds Regulations deal with the registration and prescription of standards for feeds for livestock. By an amendment in 1976, the definition of "livestock" was changed to include "fish". Thus aquaculture feed is subject to these requirements. By "feed" is meant any substance to be consumed, to provide nutritional requirements or to prevent or correct nutritional disorders. There is an exemption in the Act (s. 4) for feed "manufactured by a livestock producer if it is not offered for sale and has not had incorporated into it any drug or other substance that may adversely affect human health or the environment;" or "is sold by the individual grower thereof, if it is free from prescribed deleterious substances."

4. Financing

There are a variety of statutes and regulations that provide financial assistance of various types to fishermen: the Fisheries Development Act, the Fish-Chilling Assistance Regulations, the Fishery Products Storage Regulations, the Fishing Vessel Assistance Regulations, the Fisheries Improvement Loans Act, the Fisheries Improvement Loans Regulations and the Fisheries Prices Support Act. These items all speak in conventional fishing terms, e.g. "commercial fishing operations," "fishery resources", "fishing products", "new fisheries" and "natural product of the commercial fisheries". This legislation is on its face ambiguous as to whether a culturist would qualify.

5. Marketing Agent

The Freshwater Fish Marketing Act and the Saltfish Act both deal with the marketing of fish—in the former case with fish coming from fresh water; in the later with cured fish. In both cases the corporations created have the exclusive right to trade in the fish to which the Acts apply in interprovincial and export trade. Aquaculturists are caught by the Freshwater Fishing Marketing Act (with some exceptions), although apparently are not eligible for loans under it unless they are considered to be "engaged in fishing for commercial purposes" (s. 7(h)). Should consideration be given to setting up other marketing agencies for aquacultural produce?

6. Fish Inspection

The Fish Inspection Act and Regulations apply to all establishments where fish are processed or stored for export (s. 2). No

distinction is made depending on the source of the fish (i.e. wild or cultured). There is probably no need to think of separate requirements applying to culturists.

9. LAW REFORM

Aquaculture has come of age. As an industrial or commercial activity in Canada, it has established a foothold and is continuing to gain ground. It is important to its future development to recognize legislatively that as an enterprise, the conduct of aquaculture is distinct from fishing. The methodology and technology are different; about the only similarities are that the end product, i.e. fish, in its broadest connotations, is the same and that the activities both utilize water as a growing medium. Federal legislation in Canada has treated aquaculture as a part of the fisheries. This approach has caused confusion, both as a result of ambiquities as to whether culturing was included and in assuming as broad a constitutional jurisdiction over aquaculture as exists over fisheries. In addition the scattering of aquaculture provisions throughout a plethora of regulations makes it difficult to find and understand the federal role, as well as to develop a unified, uniform, comprehensive approach to aquaculture.

Three levels of approaching the problem of how best to correct these deficiencies suggest themselves. The first is to enact a new federal statute, which would set out the federal role in aquaculture and be the enabling legislation for more detailed regulations. This, the more comprehensive approach, suggests itself to me as the preferable choice, although it is the most cumbersome and politically difficult to initiate. It would be the federal counterpart to the approach recently taken in Nova

Scotia when its Minister of Fisheries, on March 4, 1983, introduced into the House of Assembly an Aquaculture Bill. A new federal Act would no doubt also have to be supplemented with a more detailed set of aquaculture regulations, containing much of the same matters as outlined below in the second approach. It is additionally likely that minor amendments to the existing Fisheries Act would be appropriate under this approach so as to clarify the inapplicability of that Act and the regulations under it to aquaculture operations. Undoubtedly adjustments to the existing fishery regulations would be required to remove the references dealing with aquaculture.

The second level of response would be to ignore the problems posed by using the Fisheries Act as enabling legislation and simply attempt to put together under it a single set of regulations which would apply only to aquaculture. Under the first option, i.e. divorcing aquaculture from fisheries and drafting a new statute, it would be important to assess the federal role broadly in terms of an optimum outcome; in the later case, i.e. a single set of regulations, as full an assessment would not be necessary and one would likely do little more than consolidate and rationalize the existing powers. It would be very difficult to carry out this latter task successfully without at least some relatively minor amendments to the Fisheries Act.

A third course of action might be to simply adjust the existing sets of regulations, seeking clarity and uniformity but not consolidation. This would leave province-and territory-specifc regulations each dealing with aquaculture, as well as a series of subject matter-specific regulations,

such as those dealing with fish health and shellfish. This approach would require close consultation with the provinces and would likely result in the individual tailoring of provisions to conform with each province's wishes. This process may still leave a lot of unanswered questions as it is possible that all issues will not be fully addressed by all participants. It is the option giving the least scope for providing any sense of incentive and innovation to the industry. Despite the existance of better provisions as a result of following this approach, the problem of ease of access to the regulatory framework would continue.

If the first or second approaches outlined above were adopted, what might be contained in a new statute or a consolidated set of regulations? Many non-regulatory items could be included, most appropriately in the statute, along the lines of the National Aquaculture Act of 1980[15] adopted by Congress in the United States. This could include an array of matters like research and development, resource surveys, inventories and statistics, loans and financial incentives, insurance, and technical assistance. Actual consideration of these items is not within the mandate of this paper.

With respect to regulatory matters, the new statute or set of regulations would be in large part an amalgam of the list of aspects dealt with by federal regulations as outlined in this report and in the analysis contained in my paper, Federal, Provincial and Municipal Government Roles in Aquaculture.[16] A summary of these aspects are as follows:

1. Site selection, or location, should only be a federal concern where federal government property is concerned. This would include the

Yukon and Northwest Territories and offshore areas beyond provincial boundaries, as well as public harbours, national defense establishments and national parks. Of course, in relation to these areas all aspects of aquaculture would be under federal control. The corollary is that all siting questions on provincial land and water areas would be provincial, albeit subject to federal shipping and navigation concerns. There may also be a case for a federal veto on culturing at a particular site in order to prevent a particularly high-risk situation for wild stock.

2. Importation and introduction into the waters of Canada of non-indigenous species, including the transfer from water body to water body within Canada. This would include the selection of species permissible to be cultured as not potentially impacting adversely on wild stocks.

3. All matters pertaining to fish health, both of fish imported and of existing aquacultural stock, including shellfish contamination and depuration.

4. The export from Canada or between provinces of dead fish or other aquacultural produce.

5. The security of enclosure of cultured fish so as to minimize escape or mixing with wild stock.

6. The protection of a culturing operation from marine mammals.

7. The authorization, perhaps by permit, of the collection of live fish, eggs, spat, etc. from the wild to be used in stocking an aquacultural operation.

8. The regulation of feeds, fertilizers and any other additives which may go into water and eventually affect wild fish.
9. The prohibition of fishing (and navigation?) in areas being used for culturing, without the permission of the occupant.
10. Clarification of the right to lease areas for private oyster culturing.

The power to deal with some of the matters in this list is no doubt held by both the federal and provincial governments concurrently, each acting in its own sphere for its own proper purposes. For example, both might legislate with respect to species and site selection and license the activity. It would be appropriate if feasible to harmonize policies in these overlapping areas, perhaps by setting up a joint consulation mechanism for decisions on particular applications, perhaps by carving up and specifying the limits in the overlapping areas based on pre-set, mutually agreed upon policies, perhaps simply by agreeing in advance as to which governments will do what. It is certainly more efficient and conducive to industrial promotion for governments to be clearly co-ordinated, although typically advance co-ordination has proven the exception in Canadian federal-provincial governmental relations.

10. CONCLUSION

In summary, I have provided a complete statement of present federal aquaculture regulation based on the material provided to me. This has included a review that raises questions about the constitutionality of aspects of that regulation and highlights weaknesses in the regulations themselves related to confusion over application, difficulty of access and

lack of uniformity. Three possible methods of reforming the legislative framework have been suggested, varying by the degree to which emphasis is placed upon the need to achieve clarity, comprehensiveness and uniformity. The time may now be ripe to proceed with the production of an actual draft of new federal legislation.

The draft legislation could take the form of a "discussion paper in legislative form." This means that a full and complete statement of the actual legislative provisions, section by section, would be provided, together with any appropriate explanatory comments and editorial notes. This draft of possible legislative provisions could then form the basis for detailed but informal discussions within DFO, amongst federal government departments, with provincial government administrators and officals (not at the political level), with industry, and others, each as considered desirable. These comments could then be incorporated into a final DFO document which could then go to legislative draftsmen within the Department of Justice to be reviewed as to form and harmony with other federal legislation (not as to policy), and then on to Cabinet for formal consideration with a view to enactment (I am not sure exactly what procedures would be normal: the objective would be to provide a full draft satisfactory to DFO).

The exercise of preparing and putting forward for discussion an actual draft of proposed legislation ensures precision on the part of all participating. It is also conducive to mature and reasoned response, clear policies and a well thought-out, workable final product. I recommend that draft legislation (i.e. a discussion paper in legislative form) intended to

eliminate as much as possible the problems disclosed in this paper, and adopting one of the three approaches to law reform outlined, be prepared. This appears to be the next logical step in ensuring that meaningful legislative reform in fact takes place.

NOTES

1. Bruce H. Wildsmith, Aquaculture: The Legal Framework (Toronto: Emond-Montgomery Ltd., 1982).

2. Bruce H. Wildsmith, Federal, Provincial and Municipal Government Roles in Aquaculture, a paper prepared for the National Aquaculture Conference, St. Andrews, N.B., July 10-14, 1983 and to be latter published in connection with the Conference; Aquaculture: The Legal Framework, supra note 1.

3. Supra note 2.

4. See the Schedule to the Oyster Fisheries Act, R.S.N.S. 1967, c. 200.

5. Richard W. Parisien, The Fisheries Act: Origins of Federal Delegation of Administrative Jurisdiction to the Provinces (Ottawa: Dept. of Environment, 1972).

6. Details are contained in the summary sheets appended to this paper.

7. A.G.N.S. v. A.G. Can. (Nova Scotia Interdelegation Case), [1951] S.C.R. 31. See also R. v. Tenale et al., unreported, B.C. Co. Ct., February 2, 1982 per Andrews, C.C.J., wherein it was held that B.C. Regulation 86/80 (the B.C. Non-Tidal Sports Fishing Order, under which the B.C. Minister of Environment "assumed total control and authority over the British Columbia Inland Fishery") was constitutionally invalid because it was based on an invalid power given to the B.C. Minister of the Environment by the federal Cabinet in s. 58 of the B.C. Fishery (General) Regulations. Judge Andrews said that s. 58 did not merely grant administrative authority over the inland fishery to the province (which would have been permissible) but was "nothing less than a resignation by the federal authority of its [legislative] responsibility and authority over British Columbia's inland fishery" (and hence invalid legislative interdelegation).

8. Nova Scotia Interdelegation Case, supra note 7, at 38, as cited in Tenale, supra note 7, at 6.

9. R. v. Fowler (1980), 32 N.R. 230 (S.C.C.) at 240-41, adopting B.C. Fish Canneries Reference, [1928] S.C.R. 457, at 472, quoted in Wildsmith, supra note 1, at 49.

10. (1981), 34 N.B.R. (2d) 169 (Q.B.).

11. Wildsmith, supra note 1, at 53-4, 81, and note 2, at 26-7.

12. Wildmsith, Federal, Provincial and Municipal Government Roles in Aquaculture, supra note 2, at 15-23.

13. Wildsmith, supra note 1, at 101-03.

14. Ottawa: Department of Fisheries and Environment, Fisheries and Marine Service, 1977, Misc. Special Publication No. 31.

15. Pub. L. No. 96-362, 94 Stat. 1198.

16. Supra note 2.

APPENDIX I

Alphabetical Listing of Acts and Regulations Reviewed

Animal Disease and Protection Act, Stats. Can. 1974-75-76, c. 86

Animal Disease and Protection Regulations, C.R.C. 1978, c. 296

Brucellosis Low Incidence and Free Regions Orders

Psittacine and Songbird Importation Prohibition Order

Appropriation Acts (not included)

Fishing Vessel Insurance Regulations, C.R.C. 1978, c. 325

Coastal Fisheries Protection Act, R.S.C. 1970, c. 21

Coastal Fisheries Protection Regulations, C.R.C. 1978, c. 413

Crop Insurance Act, R.S.C. 1970, c.C-36

Crop Insurance Regulations, C.R.C. 1978, c. 445

Feeds Act, R.S.C. 1970, c.F-7

Feeds Regulations, C.R.C. 1978, c. 665

Fisheries Act, R.S.C. 1970, c.F-14

Alberta Fishery Regulations, C.R.C. 1978, c. 838

Atlantic Coast Marine Plant Regulations, C.R.C. 1978, c. 805

Atlantic Crab Fishery Regulations, C.R.C. 1978, c. 806

Atlantic Fishery Regulations, C.R.C. 1978, c. 807

Atlantic Fishing Registration and Licensing Regulations, C.R.C. 1978, c. 808

Atlantic Herring Fishery Regulations, SOR/83-82

Beluga Protection Regulations

Bluefin Sport Fishery Regulations, C.R.C. 1978, c. 810

British Columbia Fishery (General) Regulations, C.R.C. 1978, c. 840

British Columbia Sport Fishing Regulations, SOR/82-645

Fish Health Protection Regulations, C.R.C. 1978, c. 812

Fishway Obstructions Removal Regulations, C.R.C. 1978, c. 814

Foreign Vessel Fishing Regulations, C.R.C. 1978, c. 815

Fraser River Sockeye and Pink Salmon Fishery Regulations, C.R.C. 1978, c. 816

Lobster Fishery Regulations, C.R.C. 1978, c. 817

Manitoba Fishery Regulations, C.R.C. 1978, c. 843

Narwhal Protection Regulations, C.R.C. 1978, c. 820

New Brunswick Fishery Regulations, C.R.C. 1978, c. 844

New Brunswick Tidal Waters Boundary Order, C.R.C. 1978, c. 845

Newfoundland Fishery Regulations, SOR/78-443

Northwest Territories Fishery Regulations, C.R.C. 1978, c. 847

Nova Scotia Fishery Regulations, C.R.C. 1978, c. 848

Nova Scotia Tidal Waters Boundary Order, SI/81-13

Ontario Fishery Regulations, C.R.C. 1978, c. 849

Pacific Coast Marine Plant Regulations, C.R.C. 1978, c. 822

Pacific Commercial Salmon Fishery Regulations, C.R.C. 1978, c. 823

Pacific Fishery Management Area Regulations, SOR/82-215

Pacific Fishery Registration and Licensing Regulations, C.R.C. 1978, c. 824

Pacific Herring Fishery Regulations, C.R.C. 1978, c. 825

Pacific Shellfish Regulations, C.R.C. 1978, c. 826

Penalties and Forfeitures Proceeds Regulations, C.R.C. 1978, c. 827

Prince Edward Island Fishery Regulations, C.R.C. 1978, c. 850

Quebec Fishery Regulations, C.R.C. 1978, c. 852

Sanitary Control of Shellfish Fisheries Regulations, C.R.C. 1978, c. 837

Saskatchewan Fishery Regulations, SOR/79-486

Seal Protection Regulations, C.R.C. 1978, c. 833

Tuna Fishery Regulations, C.R.C. 1978, c. 834

Walrus Protection Regulations, SOR/80-338

Yukon Territory Fishery Regulations, C.R.C. 1978, c. 854

Fisheries and Oceans Research Advisory Council Act, R.S.C. 1970, c.F-24

Fisheries Development Act, R.S.C. 1970, c.F-21

Fish-Chilling Assistance Regulations, C.R.C. 1978, c. 861

Fishery Products Storage Regulations, C.R.C. 1978, c. 862

Fishing Vessel Assistance Regulations, C.R.C. 1978, c. 863

Fisheries Improvement Loans Act, R.S.C. 1970, c.F-22

Fisheries Improvement Loans Regulations, C.R.C. 1978, c. 864

Fisheries Prices Support Act, R.S.C. 1970, c.F-23

Fishing and Recreational Harbours Act, Stats. Can. 1977-78, c. 30

Fishing and Recreational Harbours Regulations, SOR/78-767

Fish Inspection Act, R.S.C. 1970, c.F-12

Fish Inspection Regulations, C.R.C. 1978, c. 802

Freshwater Fish Marketing Act, R.S.C. 1970, c.F-13

Northern Pacific Halibut Fisheries Convention Act, R.S.C. 1970, c.F-17

Canadian Pacific Halibut Regulations, C.R.C. 1978, c. 857 (to be re-issued)

International Pacific Halibut Convention Regulations, SOR/82-465

North Pacific Fisheries Convention Act, R.S.C. 1970, c.F-16

North Pacific Fisheries Convention Regulations, C.R.C. 1978, c. 856

Northwest Atlantic Fisheries Convention Act, R.S.C. 1970. c.F-18 (to be re-issued)

International Fishing Vessel Inspection Regulations, C.R.C. 1978, c. 859 (to be re-issued)

Pacific Fur Seals Convention Act, R.S.C. 1970, c.F-33

Pacific Salmon Fisheries Convention Act, R.S.C. 1970, c.F-19

Pesticide Residue Compensation Act, R.S.C. 1970, c.P-11

Pesticide Residue Compensation Regulations, C.R.C. 1978, c. 1254

Saltfish Act, R.S.C. 1970, c. 37

Territorial Sea and Fishing Zones Act, R.S.C. 1970, c. T-7

Fishing Zones of Canada (Zones 1, 2 and 3) Order, C.R.C. 1978, c. 1547

Fishing Zones of Canada (Zones 4 and 5) Order, C.R.C. 1978, c. 1548

Fishing Zones of Canada (Zone 6) Order, C.R.C. 1978, c. 1549

Territorial Sea Geographical Coordinates Order, C.R.C. 1978, c. 1550

APPENDIX II

CANADA WIDE

Federally Regulated Aquaculture Activity	Legislative Base
Importing live and dead cultured Salmonids or eggs of wild Salmonids, both into country and between provinces - require import permit based on certificate of fish health official (some provincial officials appointed local fish health officers)	Fish Health Protection Regulations, s. 3
Interprovincial or international trade of dead fish	Fish Inspection Regulations, s. 3, 4
Oysters - licence or lease in coastal waters	Fisheries Act, s. 45
Lobster pound - licence	Fisheries Act, s. 18 and Lobster Fishery Regulations
Setting aside water for artificial propagation of fish	Fisheries Act, s. 44
Shellfish growing area approval and shellfish shipper certification (for exports to U.S.)	Bilateral agreement between Canada and the United States (1948) and Sanitary Control of Shellfish Fisheries Regulations
Placing material in tidal waters, i.e. lining of oyster beds - permit required	Ocean Dumping Act
Placing obstructions in navigable waters - permit required	Navigable Waters Protection Act and Regulations
Fish feeds	Feeds Act

ALBERTA

Federally Regulated Aquaculture Activity	Legislative Base
None	

Provincially Regulated Aquaculture Activity (provincial provisions not intended to be complete)

Game fish and game fish eggs - import requires permit	Alberta Fishery Regulations, s. 59 (federal delegation to province)
- breeding or keeping live requires authorization	Alberta Fishery Regulations, s. 60
Fish and fish eggs - licence	The Fish Marketing Act, S. 11
Exotic species (freshwater prawns and some warmwater finfish)	Introduction prohibited in practice (legislative authority The Fish Marketing Act, s. 11?)
Fish health (salmonids) - provincial official appointed local fish health officer	Fish Health Protection Regulation, s. 2 (federal delegation to province)

Federal-Provincial Fisheries/Aquaculture Agreements

July 26, 1930 P.C. 1714 (Orders in Council transferring hatcheries to
August 6, 1930 P.C. 1858 Manitoba, Saskatchewan and Alberta)

Special Constitutional Considerations

Natural Resources Transfer Agreement, 1930
R.S.C. 1970, Appendices No. 25, Constitution Act, 1930

Schedule 2 Alberta, s. 9

> 9. Except as herein otherwise provided, all rights of fishery shall, after the coming into force of this agreement, belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, licence or otherwise, subject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries.

Literature

Barton, B.C. (rev'd A.J. Chamberlain), Game Fish Farming in Alberta (Alberta Dept. of Energy and Natural Resources, Fish and Wildlife Div., 1979).

BRITISH COLUMBIA

Federally Regulated Aquaculture Activity	Legislative Base
Salmon and trout in tidal waters--licence	British Columbia Fishery (General) Regulations? (s. 27?) (advised that these licences no longer required or issued)
Molluscs (abalone, mussels, etc. but not oysters),	(Pacific Commercial Salmon Fishery (Regulation? (Pacific Fishery Registration and Licensing (Regulations? (Pacific Shellfish Regulations?
Introduction and transport of live fish or fish eggs - minister's authority	B.C. Fishery (General) Regulations, s. 27, 60, 61

Provincially Regulated Aquaculture Activity (provincial provisions not intended to be complete)

"Fish" (primarily trout) in non-tidal waters--licence from Minister of Environment for B.C.	B.C. Fishery (Gen.) Regs., s. 65 (federal delegation to province)
Oysters - lease from province - permit from province	1912 Oyster Lease Agreement Pacific Shellfish Regulations, s. 15
Marine Plants (only harvesting directly licensed)	
Fish health (live and dead salmonids) - provincial officials appointed local fish health officers	Fish Health Protection Regulations, s. 2 (federal delegation to province)

Federal-Provincial Agreements		Have Copy
June 1 & 3, 1901	Exchange of telegrams--B.C. got control of freshwater except in waters up which salmon and shad travelled (Parisien p. 9-10)	
Oct. 7, 1912	Oyster Lease Agreement (B.C. to grant and administer oyster leases)	Yes
1950	Confirmation of 1912 Agreement	No
Oct. 12, 1937 (P.C. 2532)	Order-in-Council transferring sport fish hatcheries to B.C.	Yes
March 1, 1979	Salmonid Enhancement Program Agreement	Yes

B.C. (cont'd.)

Special Constitutional Terms

Order of Her Majesty in Council admitting B.C. into the Union, May 16, 1871, R.S.C. 1970, Appendix II, Document 10, Clause 5E. of Schedule:
"5. Canada will assume and defray the charges for the following services: ...
E. Protection and Encouragement of Fisheries; ..."

R.S.C. 1970, Appendix No. 25, BNA Act, 1930, Schedule No. 4, Agreement between Canada and B.C. reconveys back to B.C. lands in Railway Belt and Peace River Block (effect to transfer property right in the freshwater fishery in these lands back to province)

Literature

Tillapaugh, D.L. and J.C. Edwards. A Permit and License Guide for the Prospective Aquaculturist. Victoria: B.C. Ministry of Environment, Marine Resources Branch, 1980.

Quayle, D.B. and D.W. Smith. A Guide to Oyster Farming. Victoria: B.C. Ministry of Environment, Marine Resources Branch, 1976.

MANITOBA

Federally Regulated Aquaculture Activities	Legislative Base
Fish health - dead fish (salmonids)	Fish Health Protection Regulations, s. 2
(Fisheries in tidal waters on Hudson Bay federally regulated by Northwest Territories Fishery Regulations, s. 6 - need Minister's authority to introduce live fish or fish eggs)	

Provincially Regulated Aquaculture Activities (provincial provisions not intended to be complete)

Finfish (trout) - fish farming licence (commercial)	Manitoba Fishery Regulations, ss. 39 and Schedule II (federal delegation to province)
- fish farming permit (non-commercial)	Manitoba Fishery Regulations, s. 57 and Schedule II
Transport live fish - live fish handling permit	Manitoba Fishery Regulations, s. 53(1) & Schedule II
Fish health - live fish (salmonids) - provincial official appointed local fish health officer	Fish Health Protection Regulations, s. 2 (federal delegation to province)

Federal-Provincial Fisheries/Aquaculture Agreements

July 26, 1930 P.C. 1714
August 6, 1930 P.C. 1858 (Orders in Council transferring hatcheries to Provinces of Manitoba, Saskatchewan and Alberta)

Special Constitutional Provisions

Natural Resources Transfer Agreement, 1930
R.S.C. 1970, Appendices No. 25, Constitution Act, 1930

Schedule 1 Manitoba, S. 10

10. Except as herein otherwise provided, all rights of fishery shall, after the coming into force of this agreement, belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, licence or otherwise, subject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries.

Literature

W. Hayden, Trout Farming in Manitoba (Winnipeg: Manitoba Dept. of Natural Resources, Fisheries Branch, 1980).

NEW BRUNSWICK

Federally Regulated Aquaculture Activities	Legislative Base
Introduction of non-native fish - Min.'s permission	N.B. Fishery Regs., s. 7(8)
Shipping of fish during closed season - shipping certificate	N.B. Fishery Regs., s. 5(1)
Introduction of non-native oysters - Min.'s authority	N.B. Fishery Regs., s. 22(10)
Fish health (salmonids)	Fish Health Protection Regs., s. 3
Oysters - variety of controls	N.B. Fishery Regs., s. 22
Trout, breeding or rearing for commercial purpose - permit	N.B. Fishery Regs., s. 27(7)

Provincially Regulated Aquaculture Activities (provincial provisions not intended to be complete)

Finfish - fish ponds for angling only - licence required	Fish and Wildlife Act and Reg. 69-86
Oysters - leasing	Oyster Fisheries Act, s. 2 (not actively administered)
Lobsters - leasing subaquatic lands for pound	N.B. Reg. 63-48
Leasing of subaquatic lands (used for lobster pounds, salmon pens, and oyster beds)	Crown Lands and Forests Act, s. 23

Federal-Provincial Fisheries Aquaculture Agreements

1899 - N.B., N.S. & P.E.I. agreed with Dominion to leave complete administration of fisheries with federal government pending outcome of test case to settle ownership of tidal or seacoast waters within or adjacent to these provinces (Parisien, p. 11).

Special Constitutional Provisions

Literature

NEWFOUNDLAND

Federally Regulated Aquaculture Activities	Legislative Base
Sale of fish taken in fresh water prohibited	Newfoundland Fishery Regulations, s. 25
Introduce non-indigenous fish or transfer fish from one water to another within province - require permission	Newfoundland Fishery Regulations, s. 5
Mollusc culture - lease of marine areas	Fisheries Act, s. 45
Fish health (salmonids)	Fish Health Protection Regulations, s. 3

Provincially Regulated Aquaculture Activities (provincial provisions not intended to be complete)

Oysters - leases	Oyster Fisheries Act (Nfld.)

Federal-Provincial Fisheries/Aquaculture Agreements

No formal documents

Some suggestion in Parisien (p. 30-31) that province retained control of inland sport fishery until 1954, when it was turned over to federal government. This probably was simply a result of expiry of a 5 year transition period in s. 22 of Terms of Union.

Special Constitutional Provisions

Section 22 of the Terms of Union of Newfoundland with Canada contained in the Constitution Act, 1949, R.S.C. 1970, Annex, No. 30 deals with fisheries. However, this provision only deals with a transition from provincial control to federal and has no continuing relevance.

Literature

NOVA SCOTIA

Federally Regulated Aquaculture Activities	Legislative Base
Mollusc-leasing subaquatic land	1936 Mollusc Agreement and Oyster Fisheries Act (N.S.)
Trout, breeding or rearing - licence	N.S. Fishery Regs., s. 27(3)
Shipping fish during closed season - shipping certificate	N.S. Fishery Regs. s. 5
Introduction of non-indigenous fish (including shellfish) - licence	N.S. Fishery Regs., s. 17.1
Fish health (salmonids)	Fish health Protection Regs., s. 3

Provincially Regulated Aquaculture Activities (provincial provisions not intended to be complete)

Federal-Provincial Fisheries/Aquaculture Agreements	Have Copy
1999 - N.B., N.S. & P.E.I. agreed with Dominion to leave complete administration of fisheries with federal government pending outcome of test case to settle ownership of tidal or seacoast waters within or adjacent to these provinces (Parisien, p. 11).	
1936 - Mollusc Agreement (Schedule to Oyster Fisheries Act, R.S.N.S. 1967, c. 220)	Yes
June, 1982 - Hatchery Transfer Agreement	Yes

Special Constitutional Provisions

Literature

ONTARIO

Federally Regulated Aquaculture Activities	Legislative Base
Fish health - dead fish (salmonids)	Fish Health Protection Regulations, s. 2
(Fisheries in tidal waters on James and Hudson Bays federally regulated by Northwest Territories Fisheries Regulations, s. 6 - need Ministers authority to introduce live fish or fish eggs	

Provincially Regulated Aquaculture Activities (provincial provisions not intended to be complete)

Finfish (bass and trout)	- licence to propagate and sell	The Game and Fish Act, s. 69(1).
	- licence to sell bass or trout	Ontario Fishery Regulations, s. 29(1) (federal delegation to province)
Any fish	- importation into or taking live fish or spawn from Ontario waters	Ontario Fishery Regulations, ss. 18, 60
Fish health - live fish (salmonids) - provincial official appointed local fish health officer)		Fish Health Protection Regulations, s. 2 (federal delegation to province)

Federal-Provincial Fisheries/Aquaculture Agreements		Have Copy
1899	- Administrative control of all the inland fisheries, both game and commercial, delegated to Province--no one document--a series of correspondence and conferences (Parisien, p. 6)	No
May 8, 1926 (P.C. 714)	- Order in Council reporting transfer of hatcheries to Ontario, which apparently took place between 1912 and 1915 (Parisien, p. 23)	Yes

Special Constitutional Provisions

Literature

PRINCE EDWARD ISLAND

Federally Regulated Aquaculture Activity	Legislative Base
Molluscs (oysters, mussels)	1928 Agreement (But note Oyster Fisheries Act (PEI) and Oyster Area Registry Act (PEI)).
Non-native fish introduction - permit required	P.E.I. Fishery Regs., s. 7
Non-native oyster introduction - full prohibition	P.E.I. Fisheries Regs., s. 24(11)
Shipping fish - require shipping certificate	P.E.I. Fishery Regs., s. 5
Trout - permit required	P.E.I. Fishery Regs., s. 27(3)
- export prohibited	P.E.I. Fishery Regs., s. 27(1)
Fish health (salmonids)	Fish Health Protection Regs., s. 3

Provincially Regulated Aquaculture Activity (provincial provisions not intended to be complete)

Federal-Provincial Fisheries/Aquaculture Agreements	Have Copy
1899 - N.B., N.S. & P.E.I. agreed with Dominion to leave complete administration of fisheries with federal government pending outcome of test case to ownership of tidal or seacoast waters within or adjacent to these provinces (Parisien, p. 11).	
Feb. 27, 1928 - Leasing of subaquatic lands for shellfish culturing transferred to federal government.	Yes

Special Constitutional Provisions

Literature

QUÉBEC

Federally Regulated Aquaculture Activities	Legislative Base
Fish health - dead fish (salmonids)	Fish health Protection Regulations, s. 2

Provincially Regulated Aquaculture Activities (provincial provisions not intended to be complete)

Fish and fish egg transport, transfer to other waters, keep for breed stock, extract eggs, import, export - permits required	Québec Fishery Regs., ss. 12-14 (federal delegation to province)
Hatchery establishments - licenced & regulated in some detail	Qué. Fishery Regs., s. 28
Piscicultural establishment	Wild-life Conservation Act (Qué.), s. 42
Leasing land for pisciculture	Lands and Forests Act
Fish health - provincial official appointed local fish health officer	Fish Health Protection Regulations, s. 2 (federal delegation to the province)

Federal-Provincial Fisheries/Aquaculture Agreements		Have Copy
1898	- Agreement that Québec administer fisheries in tidal waters of St. Lawrence R. & tributaries (Parisien, p. 11).	
1899	- Administration of fisheries in inland waters delegated to Quebec--Federal Government claimed fisheries jurisdiction in Gulf of St. Lawrence below a line drawn from Cap Chat to Pointe des Monts--no formal agreement, just exchange of correspondence and personal interviews (Parisien, p. 6-7).	
July 30, 1915 (P.C. 1786)	- Federal hatcheries turned over to Québec	
Feb. 13, 1922 (P.C. 360)	- Dominion Order in Council authorizes handing over the "entire administration of the [coastal] fisheries, under the Fisheries Act and regulations passed thereunder" except Magdalen Islands to Québec also included remaining hatcheries	Yes
Feb. 18, 1922 (No. 307)	- Québec Order in Council accepts delegation	No
March 15, 1943 (P.C. 1890)	- enlarges 1922 agreement to include Magdalen Islands and administration of cannery operations and canned fish and shellfish inspection (regulations under Meat and Canned Foods Act and Fish Inspection Act) to Québec.	

Quebec (cont'd.)

March 28, 1979 (P.C. 1959-353) - Administration of regulations under the Fish Inspection Act and Meat and Canned Foods Act transferred back to federal government

April 8, 1959 (No. 310) - Québec Order in Council accepting transfer back to federal government contained in P.C. 1959-353

Special Constitutional Provisions

Literature

SASKATCHEWAN

Federally Regulated Aquaculture Activity	Legislative Base
Fish health - dead fish (salmonids)	Fish Health Protection Regulations, s. 2

Provincially Regulated Aquaculture Activity (provincial provisions not intended to be complete)

Commercial Fish Farm - licence	The Fisheries Act (Sask.), ss. 27-38
Private Fish Farm - licence	The Fisheries Act (Sask.), ss. 39-44
Take, import, transfer live fish or live fish eggs - licence	Sask. Fishery Regulations, s. 42. (federal delegation to province).
Fish health - live fish (salmonids) - provincial official appointed local fish health officer	Fish Health Protection Regulations, s. 2 (federal delegation to province)

Federal-Provincial Fisheries/Aquaculture Agreements

July 26, 1930 P.C. 1714 (Orders in Council transferring hatcheries to
August 6, 1930 P.C. 1858 Manitoba, Saskatchewan and Alberta)

Special Constitutional Provisions

Natural Resources Transfer Agreement, 1930
R.S.C. 1970, Appendices No. 25, Constitution Act, 1930

Schedule 3 Saskatchewan, s. 9

9. Except as herein otherwise provided, all rights of fishery shall, after the coming into force of this agreement, belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, licence or otherwise, subject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries.

Literature

Aquaculture in Saskatchewan (Regina: Sask. Ministry of Tourism and Renewable Resources, Fish and Wildlife Branch, April 1980).

APPENDIX III

Dear Sir:

Re: AQUACULTURE REGULATION

I am assisting the federal Department of Fisheries and Oceans under Dr. G.I. Pritchard with a review of its role in aquaculture regulation and administration. I am hopeful that you might be able to help me in my work by providing information and documents. Specifically, would you respond in as much detail as reasonably convenient to the following:

1. What aspects of aquaculture are federally administered in (province)?

2. What is the legislative base for this assertion of jurisdiction? This would likely stem from particular sections in the regulations.

3. What administrative practices are followed in administering aquaculture regulations? These practices may supplement or deviate from what is actually contained in the regulations. The practices might also be contained in policy or practice manuals or guidelines.

4. What federal-provincial agreements exist dealing with fisheries or aquaculture matters? Please provide copies of the original document.

As I hope you can see from these questions, I am trying to ascertain what is actually done in practice by way of aquaculture control and then to piece together the legal powers which support those practices. The legal powers must be found in properly enacted statutes and

regulations, which in turn must be supported by the division of constitutional powers or federal-provincial agreements. I have fairly full information on statutes and regulations and the constitutional division of powers, but weaker information on what is actually done in the field and poor information on federal-provincial agreements. A large part of my work will entail trying to ensure a closer correlation between federal administrative practices and legal powers; and so, any comments you have about this will be useful and very much appreciated.

I am attaching a summary of what information I now have bearing on the questions I have asked. Perhaps you could use this as a starting point.

I know that my request for information could entail a reasonable degree of work. Thus let me thank you in advance for your time and energy. I trust the end result will be useful to you as well as myself by clarifying some loose understandings and in ultimately improving the regime under which aquaculture operates. Your assistance is very much appreciated.

Yours faithfully

Bruce H. Wildsmith
Associate Professor of Law

CMN

Enclosure

APPENDIX IV

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POOR

QUALITY

ORIGINAL